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Federal Communications Commission
Office of the Secretary

Via Electronic Filing

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Application for Review of *KHNL/KGMB License Subsidiary, LLC & HITV License Subsidiary, Inc.*, 26 FCC Rcd 16087 (MB 2011)

2010 Quadrennial Review of Broadcast Ownership Rules, MB 09-182

Dear Ms. Dortch:

On June 10, 2013, Christopher Conybeare, the President of Media Council Hawai`i ("MCH"), MCH counsel Angela Campbell, Co-Director of the Institute for Public Representation ("IPR"), and Sean Vitka, an intern at IPR, met with Royce Sherlock, Attorney-Adviser to Chairwoman Mignon Clyburn, regarding the proceedings referenced above.

At the meeting, we summarized the facts presented in MCH's Complaint and Request for Emergency Relief filed on October 7, 2009, and subsequent filings alleging that Raycom had obtained *de facto* control over three television stations serving Honolulu in violation of the Communications Act and the duopoly rule. We also summarized the arguments made in MCH's Application for Review ("Application") filed December 27, 2011, of the Media Bureau ("Bureau")'s Memorandum Opinion and Order ("Order") denying the complaint. We gave a copy of the Application for Review to Ms. Sherlock. The Application for Review, along with the Opposition and Reply, are attached to this letter. We noted that this proceeding was designated permit-but-disclose for purposes of the ex parte rule.

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We urged the Commission to act promptly on the Application for Review. This action is necessary to resolve a novel question of law and to correct factual errors. We noted that the Media Bureau agreed that the transaction was clearly at odds with the purpose and intent of the duopoly rule, but nonetheless denied the request for emergency relief and suggested that the issue be addressed in the ongoing 2010 Quadrennial Review or in a challenge to the stations' license renewals.

We explained that these alternative venues for relief are not effective. Although MCH filed comments in the 2010 Quadrennial Review proposing a test for attributing sharing arrangements like those in Honolulu,[1] the 2010 Quadrennial Review has not yet been concluded. Nor is it clear when the proceeding will be concluded or whether it will address the issue of shared services. A license renewal challenge would not be due until January 2015. Moreover, in counsel's experience, the FCC has let license renewal challenges sit unresolved for longer than the term of the license.

Mr. Conybeare explained how the provision of news programs for the three television stations, including the NBC and CBS affiliates, by Raycom's Hawai`i News Now ("HNN") has effected the loss of an independent source of news. He cited a study by Professor Danilo Yanich finding that the shared services resulted in a reduction in the quality of local television news.[2] The lack of source diversity has been exacerbated by the loss of one of two daily newspapers. Further, HNN is sharing resources and cross-promoting stories with the remaining daily newspaper. And because of its location, Hawai`i is unable to receive broadcast stations from other states.

We further argued that prompt action was needed prevent the creation of new "virtual duopolies" in other communities. We noted that in the spring of 2011, we were aware of approximately 100 sharing arrangements.[3] We recently learned of the creation of five more.[4] A copy of this letter is attached. Finally, we noted that these agreements between same-market broadcast television stations had prompted Senator Rockefeller to request an investigation by the Government Accountability Office ("GAO"). A copy of that letter is also attached.

Please feel free to contact me if you have any questions.

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[1] *See* Comments of Office of Communication of United Church of Christ, Inc., et al. MB Docket No. 09-182 (Mar. 5, 2012) at 28 ("Comments of UCC").
[2] *See* Danilo Yanich, *Local TV & Shared Services Agreements: Examining News Content in Honolulu*, MB dkt. No. 09-182, filed Feb. 10, 2011 at 11 ("Danilo Yanich") (also filed in the Honolulu proceeding in letter from Angela Campbell to Marlene H. Dortch (Feb. 18, 2011)).
[3] *See* Comments of UCC at 3.
[4] *See* Letter from the American Cable Association to Marlene H. Dortch, MM Docket No. 09-182 (June 3, 2013).

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Sean Vitka, hereby certify that copies of the attached *Ex Parte Letter In the Matter of* Application for Review of *KHNL/KGMB License Subsidiary, LLC & HITV License Subsidiary, Inc.,* have been served by first-class mail, postage paid, this 12th of June, 2013, and by email on the following persons at the addresses shown below.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
KHNL/KGMB License Subsidiary, LLC	)	Fac. ID Nos. 34867 and 34445
	)	
Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawai`i	)))	Fac. ID No. 36917 NAL Acct. No. 201141410015 FRN No. 0016152480
	)	
And	)	
	)	
HITV License Subsidiary, Inc.	)	
	)	
Licensee of Station KFVE(TV), Honolulu, Hawa`ii	)	

Application for Review

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December 27, 2011

Summary

Media Council Hawai`i requests that the full Commission reverse the November 25, 2011 Order by the Media Bureau denying Media Council Hawai`i's Complaint and Request for Emergency Relief filed on October 7, 2009. The Complaint alleged that Raycom and HITV entered into a series of agreements that violate the Communications Act and Rules by giving Raycom *de facto* control over three television stations in Honolulu without prior FCC approval. In addition, it contends that this arrangement violates the FCC's "local television ownership limit," which prohibits common control of more than one or two television stations within the same market and common control of more than one top-four ranked station.

The Bureau Order should be reversed because it involves an important question of law or policy that has not previously been resolved by the Commission. That question is whether the local television ownership rule's prohibition against common control of more than one top-four ranked television station should not apply where the second top-four ranked station was acquired by means of a network affiliation and asset swap instead of by outright acquisition. Here, it is undisputed that Raycom directly controls two of the top-four stations in Honolulu -- KHNL, the NBC affiliate and KGMB, the CBS affiliate. The Bureau concedes that this result is inconsistent with the intent of the television duopoly rule to preclude common control of two top-four ranked stations and to allow duopolies only in limited circumstances where necessary to assist "weaker" stations. But, the Bureau nonetheless reasons that because the duopoly rule refers to the creation of duopolies "at the time of application," it is "unclear" whether the prohibition applies here because no transfer application has been filed. Where the meaning of a regulation is unclear and/or presents a novel question, the Bureau should refer the issue to the full Commission. Here, the question is particularly important because there are many other situations around the country

where stations are utilizing similar agreements to circumvent the local television ownership rules and create "virtual duopolies."

The Bureau's conclusion that no application for transfer of control is needed because Raycom has not acquired *de facto* control over the HITV station KFVE should also be reviewed by the full Commission because it is based on erroneous findings as to material questions of fact. Whether an unlawful *de facto* transfer of control has taken place depends on an analysis of the specific facts regarding programming, personnel, and finances. Despite the large factual record, the Bureau devotes only one or two paragraphs to analyzing each factor. It ignores record evidence presented by MCH that Raycom is providing essentially the same local news programming for all three stations, that HTIV's KFVE has only two employees (one of whom was formerly a Raycom General Manager), that KFVE has no tower, studio, or capacity to produce or broadcast programming on its own, and that Raycom reaps most of the profits and carries most of the financial risk from KFVE's performance.

For both of these reasons, the Commission should reverse the Bureau Order and grant appropriate relief.

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KHNL/KGMB License Subsidiary, LLC	)	Fac. ID Nos. 34867 and 34445
	)	
Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawai`i	)))	Fac. ID No. 36917 NAL Acct. No. 201141410015 FRN No. 0016152480
	)	
And	)	
	)	
HITV License Subsidiary, Inc.	)	
	)	
Licensee of Station KFVE(TV), Honolulu, Hawai`i	)	

Application for Review

Media Council Hawai`i (MCH), by its attorney, the Institute for Public Representation, pursuant to 47 CFR §1.115, respectfully requests that the full Commission reverse the Order issued by the Media Bureau on November 25, 2011, in the above-referenced proceeding. The order denied MCH's Complaint and Request for Emergency Relief filed on October 7, 2009, alleging that Raycom had obtained *de facto* control over three television stations in Honolulu in violation of 47 USC § 310(d) and 47 CFR § 73.3540, which prohibit the transfer of a broadcast license without prior FCC approval, and 47 CFR §73.3555(b), the "local television ownership limit" or "duopoly rule," which prohibits common control of more than one or two television stations within the same market and common control of more than one top-four ranked station. The Bureau Order should be reversed because involves an important question of law or policy which has not previously been resolved by the Commission and is based on erroneous findings as to material questions of fact.

I. Issues Presented

1. Whether the Bureau's decision, that the local television ownership rule's prohibition against common control of more than one top-four ranked television station should not apply where the second top-four ranked station was acquired by means of a network affiliation swap instead of by outright acquisition, presents a novel question that can only be decided by the full Commission?

2. Whether the Bureau's determination that Raycom does not exercise *de facto* control over the station nominally licensed to HITV was based on erroneous findings as to a material questions of fact?

II. Background

MCH's complaint was prompted by an announcement that Raycom[1] and HITV[2] (collectively "licensees" or "Broadcast Parties") planned to enter into a Shared Services Agreement ("SSA") without seeking prior FCC approval. Under this agreement, Raycom, then-licensee of Honolulu television stations KHNL, an NBC affiliate, and KFVE, a MyNetworkTV affiliate, would take over the operation of KGMB, a CBS affiliate, licensed to HITV. The Complaint alleged that because Raycom would exercise control over the programming, personnel, and finances of the station nominally licensed to HITV, the agreement would result in an unauthorized transfer of control in contravention of the Communications Act and FCC rules. Permitting this Agreement to take effect would also violate the local television rule by giving Raycom control over three television stations in the Honolulu DMA, including two top-four network affiliates. Further, Raycom's plan to combine the news operation of all three stations in a single operation called Hawai`i News Now, and to lay off about one third of the stations' combined workforce, would harm the MCH members and the public generally by reducing the

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[1] Raycom Media, headquartered in Montgomery, AL, through various subsidiaries, owns approximately 46 television stations as well as other media-related properties.

[2] The parent company of HITV is MCG Capital Corp., a venture capital firm based in Arlington, VA, has no other television stations.

number of independent voices providing local news from four to three, and by substantially reducing competition in the provision of local news and the sale of advertising time.[3]

MCH requested that the FCC issue a "standstill" order to prevent the execution of the SSA. MCH also requested that the Commission issue an order directing that Raycom and HITV show cause why a cease and desist order should not be issued to enjoin the implementation of the Agreement and/or revoke their licenses pursuant to 47 USC §§154(i) and 303(r) and 47 CFR §1.91.

The Commission took no action on the request for a "standstill" order and thus the SSA and several other related agreements were executed in October 2009. Pursuant to these agreements, KGMB, the CBS affiliate licensed to HITV and KFVE, the MyNetwork affiliate licensed to Raycom, swapped both network affiliations and call signs. As a result, Raycom now directly controls both KHNL, the NBC affiliate, and KGMB, the CBS affiliate. These stations simulcast identical local news programs produced by Raycom under the name of Hawai`i News Now. Raycom also exercises *de facto* control over KFVE, the MyNetwork affiliate nominally licensed to HITV. Raycom also produces local news programming for broadcast on KFVE under the name Hawai`i News Now.

A. The Record in this Case

MCH's complaint prompted the Media Bureau to engage in a lengthy factual investigation. On Oct. 23, 2009, the Bureau requested that the licensees provide copies of their agreements.[5] After the licensees submitted redacted copies, the Bureau requested unredacted

[3] Media Council Hawai`i asks the FCC to promptly issue a "standstill order" enjoining Raycom and MCG from taking any further action pursuant to the Agreement until the FCC has issued the order to show cause, the media companies have had the opportunity to respond, and a final order has been issued.

[5] Letter from Barbara A. Kreisman to Jonathan D. Blake (Oct. 23, 2009).

copies.[6] The licensees then submitted unredacted copies to the Commission, but asked for them to be treated confidentially.[7] Raycom and HITV also amended the agreements in response to Bureau's request for clarification, claiming that the provision of concern to the Bureau was the result of a "scrivener's error."[8]

Eventually, on March 29, 2010, the Bureau denied the request for confidential treatment and ordered that unredacted copies (with a few exceptions) of all five agreements be made available for public inspection.[9] Here is a brief summary of each of the agreements.

> (1) Shared Services Agreement – Raycom provides HITV with virtually all the services associated with running a television station. HITV pays Raycom a service fee equivalent to 75% of the station's monthly cash flow (revenue minus expenses). Although HITV is responsible for paying certain expenses including utility costs, insurance, its employee salaries, and FCC license fees, Raycom is obligated to reimburse HITV for these expenses.
>
> (2) Term Loan Note - HITV receives a note from Raycom for $22 million payable over approximately seven years at 5% interest.
>
> (3) Studio Lease - Gives HITV employees nonexclusive access to Raycom's studio and additional space to keep the station's public inspection file. For this access, HITV pays a monthly fee equivalent to 15% of its cash flow.
>
> (4) Purchase Option Agreement - Although Raycom initially held the option right to purchase the HITV station, the Purchase Option Agreement was amended to give to Ottumwa Media Holdings the right to acquire the HITV-licensed station for seven years. The exercise price is the difference between $22 million (the amount of the Note), plus $100, plus Excess Decommissioning Costs, if any,

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[6] Letter from Barbara A. Kreisman to Jonathan D. Blake and John Griffith Johnson, Jr. (Nov. 10, 2009).

[7] Letter from Jonathan D. Blake and John Griffith Johnson, Jr. to Marlene H. Dortch, Secretary (Nov. 9, 2009).

[8] Letter from Jonathan D. Blake and John Griffith Johnson, Jr. to Barbara A. Kreisman, at 2 (Nov. 24, 2009).

[9] Letter from Barbara A. Kreisman to Rick Daysog, et al, (Mar. 28, 2910). Mr. Daysog is a reporter who filed a request for the agreements under FOIA.

and the amount of principal Raycom already paid on the Note plus any profits HITV retained in excess of $250,000 per year.

(5) Asset Exchange Agreement – KGMB and KFVE swap network affiliation agreements, program contracts, employment contracts, and all other assets and intangibles used to operate the stations, except for the FCC licenses.

After reviewing the unredacted agreements, MCH supplemented its complaint. It contended that the unredacted agreements conclusively demonstrated that Raycom had acquired *de facto* control over the station licensed to HITV and that, as a practical matter, HITV had "sold" its station to Raycom for $22 million.[10]

Raycom and HITV denied that an unauthorized transfer of control had taken place, but failed to rebut MCH's fundamental contention that HITV neither benefited from KFVE's financial success nor did it bear the risk of KFVE's losses. KFVE's profits were essentially capped at a fixed amount, and if the station's cash flow was less than a certain amount, Raycom was obligated to make a fixed payment to HITV. Furthermore, if cash flow was negative, Raycom—not HITV—would be responsible for covering all of the station's operating costs.[11]

On September 28, 2010, after meeting with the Bureau staff, Raycom and HITV informed the Bureau that they would renegotiate and modify certain aspects of their arrangement.[12] On October 8, 2010, they submitted copies of the amended contracts which, among other things, eliminated Raycom's obligation to pay all of HITV's expenses and required HITV to pay Raycom a monthly flat fee plus 15% of its cash flow.[13] After reviewing these modifications, MCH responded that the fundamental public interest problems remained unchanged. News programming from all three stations would still come from a single

[10] MCH Supplement, at i, May 10, 2010.
[11] MCH Reply to Joint Response to Supplement, at 2, June 30, 2010.
[12] Letter from John S. Logan, et al, to Marlene Dortch, Secretary (Sept. 28, 2010).
[13] Letter from John S. Logan, et al., to Marlene Dortch, Secretary (Oct. 8, 2010).

newsroom. All three stations would use the "Hawai`i News Now" brand, the same reporters, staff, video, and anchors. Raycom would still provides KFVE with prepackaged local news programs and produces KFVE's local programming, including the University of Hawai`i sports programming and local cultural programming. KFVE would still have only two employees, no tower and no studio of its own. In short, HITV would still have no incentive to control the core operations of KFVE.[14]

MCH subsequently submitted a study documenting the detrimental effects of the SSA on local news diversity in Honolulu.[15] The study compared a constructed week of broadcasts for all five stations that broadcast news in Honolulu both before and after the implementation of the SSA. It concluded, among other things, that the proportion of news stories devoted to public issues dropped significantly for both the SSA station group (KFVE, KGMB, KHNL) and the non-SSA station group (KHON and KTTV) after the SSA took effect.[16] It also found that the SSA station group aired fewer local stories than the non-SSA group, and that this disparity increased after the SSA took effect.[17] Further, the duration of news stories on the SSA stations was significantly shorter after the SSA went into effect.[18] At the same time MCH submitted this study, it informed the Bureau that diversity of news sources had been dealt a further blow

[14] MCH Response, at 4, Nov. 8, 2010.

[15] Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary (Feb. 18, 2011), attaching Danilo Yanich, *Local TV & Shared Services Agreements: Examining News Content in Honolulu* (Feb. 2011).

[16] Yanich, *supra* note 15, at 11.

[17] *Id.* at 13.

[18] *Id.* at 14. Another indication of the diminution of news quality in Honolulu is the use of less sophisticated reporting techniques post-SSA. For example, the stations turned to less expensive presentation modes, such as the use of voice-over by anchor. *Id.* at 19. By contrast, use of the more expensive "package presentation mode," in which a news crew actually goes to the scene of the story to shoot video and investigate, was cut in half by the three stations involved in the SSA. *Id.* at 20. Given the trend toward shorter and less expensive stories, the study concluded that the "hypothetical" benefit that combined news stations would provide more enterprising news content had not materialized. *Id.* at 29.

because Honolulu's two daily newspapers merged and the combined *Honolulu Star-Advertiser* entered into a news sharing agreement with Raycom's Hawaii News Now.[19]

Next, the Bureau apparently sought additional information from the licensees regarding their programming and financial arrangements. MCH only learned of these requests when the licensees made two *ex parte* submissions in April 2011. The first *ex parte* dated April 1, 2011, states that the presentation was made in response to verbally transmitted inquiries of the Media Bureau regarding KFVE's operations and finances. The filing contained two Annexes. Annex A answered specific question about KFVE's programming and public file. Annex B concerned financial arrangements, but the actual figures were redacted. The second *ex parte* submission on April 22, 2011, responded to verbally transmitted requests for copies of the stations' quarterly issues/programs (I/P) lists for the fourth quarter of 2008 through the fourth quarter of 2010. Because some of the I/P lists were "missing " or incomplete due to "erroneous" logging, this submission included both "originally prepared" versions of their I/P lists as well as recently "reconstructed" and "revised" versions of those lists.[20]

On May 23, 2011, MCH responded to the *ex parte* submission regarding programming. MCH's analysis of the 2010 I/P lists showed that all three stations were providing essentially the same issue-responsive programming. Although there were some variations from quarter to quarter, the I/P lists for each quarter were identical in format. Moreover, most of the issue-responsive programming reported by Raycom's KGMB and KHNL was also reported by HITV's KFVE. For example, in the first quarter 2010, all three stations identified the same seven community issues.[21]

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[19] Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary, at 2 (Feb. 18, 2011).
[20] *Ex Parte Presentation of Broadcast Parties* (Apr. 22, 2011).
[21] Letter from Adrienne T. Biddings to Marlene H. Dortch, Secretary, at 3 (May 23, 2011).

MCH's response also described how members and supporters of MCH had attempted to inspect the stations' public files on September 3, 2009, shortly after they learned that Raycom planned to merge the operations of all three stations. When they visited the studio for Raycom stations, they were told by Raycom General Manager John Fink (who is now the General Manager of HITV's KFVE) that he did not know where the public file was located. Subsequently, Mr. Fink determined that public file was locked and he did not have a key.[22]

MCH pointed out that the Broadcast Parties failed to properly maintain their public inspection file as required by FCC Rule 73.3526.[23] Moreover, the Broadcast Parties' creation of "reconstructed" and "revised" I/P lists *after* the Media Bureau requested copies was not the first time that the Broadcast Parties had revised critical documents after their practices had been questioned. For example, they amended their Asset Exchange Agreement one week after MCH filed its Complaint, and again after the Media Bureau asked them to clarify certain provisions of the agreements. Finally, in October 2010, after MCH demonstrated that the financial arrangements were inconsistent with FCC precedent, the Broadcast Parties amended the contracts to reduce the appearance of HITV's financial dependency on Raycom. MCH argued that these actions, along with the violations of the public file rule, evidenced a lack of candor and raised questions about whether Raycom and HITV possessed the requisite character to remain as licensees.[26]

On June 7, 2011, MCH filed its response to the licensees' *ex parte* submission of financial data on April 1, 2011, which MCH's counsel were able to review only after signing a protective order. MCH used the formulae from the original and amended agreements to

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[22] *Id.* at 2-3.The group then went to KGMB where they were shown to the room where the file was located. However, the public file was in such disarray that it was not usable.

[23] *Id.* at 6-8.

[26] *Id.* at 9.

determine how KFVE's profits were divided between Raycom and HITV. MCH concluded that under both, Raycom reaped virtually all of the economic benefits and bore all of the risks associated with KFVE, thus leaving little incentive for HITV to control the station's core operations.[27]

B. The Bureau Order

The Bureau's Order fails to discuss this extensive record. Instead, it summarily concludes that no unauthorized transfer occurred.[28] It goes on to state that "we agree with Media Council insofar as it suggests that the net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is clearly at odds with the purpose and intent of the duopoly rule."[29] But it nonetheless declines to issue the order to show cause requested by MCH. Instead it states that it "will include in the ongoing 2010 quadrennial review proceeding the duopoly rule issues that this and similar cases raise. Moreover, as we have noted, our decision here does not preclude us from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings."[30]

[27] MCH Response, at 3 (June 7, 2011).
[28] Order at ¶14.
[29] *Id.* at ¶23.
[30] *Id.* (footnotes omitted). The Bureau also found that HITV had violated the public file rules and was "apparently liable for the base forfeiture of $10,000 for the failure to include three issues/programs lists and to provide adequate access to its station's public inspection files." In response to a separate complaint filed by Honolulu citizen Larry Geller, the Bureua merely admonished Raycom for failure to provide timely access to its stations' public inspection files in September 2009. *Id.* at ¶27.

III. The Commission Should Reverse the Bureau Order Because It Involves an Important Question of Law and Policy that has not Previously Been Resolved by the Commission

One ground for Commission review under 47 CFR §1.115(b)(2)(ii), is that the Bureau's "action involves a question of law or policy which has not previously been resolved by the Commission." Further, 47 CFR §0.283(c) requires the Media Bureau to refer to the full Commission "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." Because the Media Council's complaint raised novel questions, the Bureau lacked authority to rule on it.[31]

There is no dispute that as a result of these agreements, Raycom now directly controls of two top-four stations – KHNL, the NBC affiliate and KGMB, the CBS affiliate. Indeed, the Bureau found that the agreements "gave Raycom control over two of the top four stations in the Honolulu, HI market."[32]

MCH demonstrated that the Commission has never found a similar arrangement to be consistent with the Communications Act and FCC rules and policies. Indeed, the Commission has issued only a single decision involving sharing arrangements, and that decision *reversed* a Bureau Decision allowing sharing.[33] Even the Bureau's own prior rulings have never addressed the questions presented here. As MCH explained in its Reply:

> none of the cases addressed a situation where a licensee that already had two television stations in a market entered into an agreement to provide programming and other services to a third station. Similarly, none involved the transfer of a network affiliation so that a licensee would have two major network affiliates in violation of the top-four limitation.

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[31] *See* MCH Reply at 1 (Oct. 23, 2009).

[32] Order at ¶14.

[33] *Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002).

> We are also aware of no case where the Media Bureau allowed an agreement that made it impossible for the station sharing service to operate independently by taking down its tower and selling its studio. Nor do we know of any that included a call sign swap.
>
> . . . Nor do the Broadcast Parties even attempt to explain how this arrangement is consistent with the top-four limitation.[34]

The Bureau seems troubled by Raycom's control over two top-four stations and suggests that it is inconsistent with the intent of the television duopoly rule to preclude common control of two top-four ranked stations and to allow duopolies only in limited circumstances where it is necessary to assist "weaker" stations.[35] But, the Bureau nonetheless concludes that because the duopoly rule "specifically refers to 'at the time of application,' . . . the applicability of the top-four prohibition in the case presented here, where no application was required, is unclear."[36]

Where the meaning of a regulation is unclear, the Bureau should refer the issue to the full Commission. Instead, *without citing any precedent,* the Bureau concluded that "[b]ecause no application was involved in these transactions, and none was required, the applicability of the

[34] MCH Reply, at 10 (Oct. 23, 2009).

[35] Order at ¶22.

[36] *Id.* To the extent that the Bureau's order could be read as indicating that it lacks an appropriate remedy for this violation of the top-four prohibition because there is no pending application, it is wrong. The Bureau could have asked the Commission to issue the order to show cause requested by MCH under 47 CFR §1.91. Alternatively, it could have asked the Commission to call for early license renewal under 47 CFR §73.3539(c); s*ee WWOR-TV, Inc.*, 6 FCCRcd 6569, 6574 (1991). In contrast, the alternative forms of relief suggested by the Bureau are unacceptable. Forcing MCH to wait until the licenses come up for renewal in 2014 and file a new challenge at that time, would be ineffective given the fact that the Commission almost never denies license renewals. Steven Waldman, *The Information Needs of Communities,* at 286-88 (June 2011). Even if this practice were to change, the public would still suffer from the lack of diversity and competition for many years. Similarly, while MCH welcome the Commission's decision to seek comment on attribution of shared arrangements in *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket 09-182, at ¶¶194-208 (rel. Dec. 22, 2011), it could take many years to change the attribution rule, and it is unlikely that even if changed, the FCC would apply it retroactively.

duopoly rule to these circumstances is problematic and finding a violation of that rule in this case would be similarly problematic."[37]

It relaxing the local television rule in 1999 to allow duopolies in certain circumstances, the Commission explained that

> The "top four ranked station" component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal.[38]

By allowing a top four station to acquire a smaller station, the Commission hoped to "improve the ability of small stations to compete."[39] Thus, it makes sense that the Commission would not require subsequent divestiture simply because the efforts to nurture the weaker station were successful to the point that it made it to the top four.[40] The Commission did not appear to contemplate that single entity might be able to control two top four stations by engaging in a network affiliation and assets swap.

Thus, the issue -- whether the duopoly rule's prohibition against common control of more than one top four ranked television station should not apply where the second top four ranked station was acquired by means of a network affiliation swap instead of by outright acquisition -- is not only novel, but it is an important matter of policy that should be determined by the

[37] Order at ¶14.
[38] 14 FCC Rcd 12903, 12933-34 (1999).
[39] *Id.* at 12934.
[40] *Id.* at 12933.

Commission. In fact, the Commission already has before it two other applications for review raising the same question. The application for review of the Bureau's decision in *Malara Broadcast Group of Duluth Licensee, LCC*,[41] challenges the approval of a transfer involving a sharing arrangement that permits "consolidation of the CBS and NBC affiliate television stations in the four-station Duluth market."[42] Another application challenges the Bureau's decision in *Piedmont Television of Springfield Licensee, LLC*.[43] That application contends that the assignee, which was run by a former employee of another station in the market, was a shell to give the station "'a virtual duopoly' comprising the ABC and NBC network affiliates in Springfield, [MO], two of the top four stations in the market."[44] It further argues that the Bureau's decision completely eviscerated the local television ownership rule and that "taken to its logical conclusion the [bureau decision] would support the combination of three, four or more television stations within the same market so long as the legalist forms of agreements were observed, at least on paper."[45]

Similarly, MCH warned that:

> If the Commission does not act promptly to stop this end run around its ownership limits, stations all over the country that are experiencing financial difficulties will enter into similar arrangements. If this deal is not found to be a *de facto* transfer of control, what is to stop other stations, without even telling the Commission, to take over the operation of one, two or more stations in the same market, regardless of market size? The Commission's failure to act would also render the 2010 Quadrennial Review of the local television rules virtually

[41] 19 FCC Rcd 24070 (2004).

[42] Application for Review, at 9 (filed Jan. 13, 2005) (a copy attached to the MCH Reply, Oct. 23, 2009).

[43] 22 FCC Rcd 13910 (2007).

[44] Application for Review, at iii (filed Aug. 29, 2007) (a copy attached to the MCH Reply, Oct. 23, 2009).

[45] MCH Reply, at 3 (Oct. 23, 2009).

> meaningless, as substantial consolidation will have occurred even without changing the rules.[46]

In fact, over the past several years, many station owners have sought to get around the local television limits by creating "virtual duopolies" and other cooperative ventures. One recent study found that sharing agreements of various types were present in 83 of 210 television markets.[47] And now, because of this decision, more are on the way.

A recent article by Harry A. Jessell in *TVNewsCheck* proclaims that "Now's the Time to Make Virtual Duopolies."[48] Jessell notes that broadcasters interested in shared services agreements had "better act fast" because the "FCC will soon launch a rulemaking to determine whether such arrangements, which essentially allow broadcasters to circumvent the ban against actual ownership of two stations in small markets, are still a good idea."[49] He explains that even if the Commission decides to prohibit virtual duopolies, the "[o]ne thing broadcasters can count on the FCC not doing is ordering the dismantling of any existing arrangements."[50] He predicts that the FCC may do something to crack down on virtual duopolies, noting "What's the point of having a ban against two Big Four network affiliates in a small market merging through station-sale contract if they can do it with a bunch of management contracts?"[51]

Thus, it is important for the Commission to resolve the novel question of whether its rules permit common control of two top-four television stations so long as the common control is

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[46] Reply, at 2 (footnote omitted).
[47] Danilo Yanich, CTR. FOR COMMUNITY RESEARCH & SERVICE, LOCAL TELEVISION NEWS MEDIA PROJECT, SCHOOL OF PUBLIC POLICY & ADMINISTRATION, UNIVERSITY OF DELAWARE, LOCAL TV NEWS & SERVICE AGREEMENTS: A CRITICAL LOOK 3 (Oct. 2011), *available at* http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf.
[48] Harry A. Jessell, *Now's The Time To Make Virtual Duopolies*, TV NEWS CHECK, Dec. 9, 2011, *available at* http://www.tvnewscheck.com/article/2011/12/09/55959/nows-the-time-to-make-virtual-duopolies.
[49] *Id.*
[50] *Id.*
[51] *Id.*

accomplished through a sharing agreement rather than an outright acquisition or transfer of control. Failure to quickly resolve this issue will be interpreted as "tacit" approval of these arrangements and will lead to even further consolidation and reduced diversity in local news, thus undermining the Commission's tentative conclusion that local television rule remains in the public interest.[52]

IV. The Commission Should Reverse the Bureau Order Because it is Based on Erroneous Findings as to Material Questions of Fact

Commission review of the Bureau decision is also warranted under 47 CFR §1.115(b)(iv) because the Bureau's action is based on "erroneous finding[s] as to an important or material question of fact." Here, the Bureau's determination, that the sharing arrangements did not amount to a *de facto* transfer of control in violation of §310 of the Communications Act, turns on the analysis of the specific facts of this case. Indeed, the Bureau acknowledges that the analysis "transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented," and must be determined on a case-by-case basis.[53]

Despite the large record, the Bureau devotes only one or two paragraphs to analyzing each of the three relevant factors -- programming, personnel, and finances. Its analysis fails to consider material facts presented by MCH and its conclusions are based on erroneous factual findings.

A. Programming

The Order states that "based on a review of the entire record in this case, in particular Raycom's April 1, 2011, *ex parte* letter, we agree that HITV does, in fact, exercise programming

[52] *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket 09-182, at ¶26 (rel. Dec. 22, 2011).
[53] Order at ¶16 (footnotes omitted) citing *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8514 (1995).

control over Station KFVE(TV)."[54] Yet, the Bureau makes no findings about, or even discusses, the stations' I/P lists it requested. Instead, the Bureau minimizes the fact that Raycom produces the local news programming for KFVE, noting that such programming constitutes only 6.5% of total weekly programming aired on the station.[55] Yet, this constitutes all of KFVE's local news.

The Bureau also accepts without question the representations of Raycom and HITV that "the agreements are working as designed, permitting HITV to air newscasts produced and supplied specifically for broadcast on Station KFVE(TV) without simulcast or repetition on Raycom's television stations."[56] This conclusion ignores the fact that the I/P lists showed substantial overlap in the local news aired on KFVE and the local news aired on KHNL and KGMB.[57] It also ignores MCH's allegations, based on the viewing experience of its members, that the news programs on all three stations were identical or virtually identical."[58] To ensure that MCH's allegations were correct, MCH asked Professor Yanich Danilo to independently compare recordings of the evening newscasts by KGMB and KFVE for November 11, 2011. He found no significant difference. Specifically, he found:

> 1. Each broadcast is preceded by the same opening which announces Hawai`i News Now. It is the exact same graphics, music, and voice-over.
>
> 2. There were 15 stories presented on the KGMB newscast at 5, but they only referred to

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[54] Order at ¶18.
[55] Order at ¶18.
[56] Order at ¶11.
[57] Letter from Adrienne T. Biddings to Marlene H. Dortch, at 3-4 (May 23, 2011).
[58] *See, e.g.,* Letter from Adrienne T. Biddings to Marlene H. Dortch, at 2 (Dec. 7, 2009) (HITV and Raycom have branded their joint news operations under a single title, Hawai`i News Now: and are simulcasting identical local newscasts on all three stations."); Letter from Adrienne T. Biddings to Marlene H. Dortch, at 2 ("Before, each of the network affiliates offered independent local television coverage. Since Raycom acquired the KGMB's CBS network affiliation (as well as the KGMB call sign), KGMB no longer offers independent local news. Instead, it simulcasts a single newscast, known as Hawai`i News Now, which is also shown on Raycom's NBC affiliate KHNL. Hawai`i News Now also provides local news programming that is virtually identical to KFVE.").

4 separate issues: a helicopter crash on Moloka'i; the beginning of the APEC conference in Honolulu; the strike of the telecom workers and Billy Crystal assuming the Oscar host duties.

3. Of the 15 stories, 8 referred to aspects of the APEC (Asia-Pacific Economic Cooperation) conference and they were "anchored" at the live location by a KGMB reporter.

4. When the stories were reported on KFVE, the stories were introduced by the same anchors, reported by the same reporters, using the same script and the same video. Over the course of the evening as more information came in about the helicopter crash, new video was added to the story. The APEC story, however, was covered in the exact same way across the stations.

The Bureau also accepts without question the licensees' representations that the sharing arrangement has improved the quality of their local news programming.[59] This conclusion ignores the prior findings of Professor Yanich that the quality of the news programming has declined since Hawai`i News Network started producing news for all three stations.[60]

The Bureau also points to the fact that KFVE's General Manager writes and delivers two editorials that are aired four times weekly. However, the Bureau ignores fact that all three stations ran the same editorials. As MCH pointed out in its analysis of the I/P lists:

> The "Local Connections" segments produced by Rick Blangiardi, the General Manager of KGMB and KHNL, also aired on KFVE. At the same time, the "Think About It" editorials produced by John Fink, HITV's General Manager, aired on Raycom's KGMB and KHNL stations. Comparison of Appendix A and Appendix B reveals that, for example, on February 1, 2010, a segment titled "Local Connections – Rick Blangiardi" aired on both KFVE and KGMB. In a competitive marketplace, it would be unthinkable for one station to air the editorial segments produced by the General Manager of a competing station. There is simply no viewpoint diversity when the respective General Managers appear on both Raycom and HITV stations.[61]

[59] Order at ¶11.

[60] Yanich, *supra* note 15, at 28.

[61] Letter from Adrienne T. Biddings to Marlene H. Dortch, at 4 (May 23, 2011) (citations omitted).

The fact that much of KFVE's programming is provided through an affiliation agreement with MyNetworkTV does not reflect HITV's exercise of editorial control since HITV was required to take the MyNetworkTV affiliation under the terms of the Asset Exchange Agreement. And while KFVE may have rejected some the MyNetwork programming, it is much more significant that the station has *never* rejected a local newscast provided by Raycom.[62]

Significantly, KFVE's current General Manager, John Fink, was the former General Manager for Raycom's stations. Given this relationship, Fink's recent efforts to bid for syndicated programming and local programs reported in the April 1, 2011 filing do not show independent editorial control if done with Raycom's knowledge and approval. The Bureau order does not even mention Fink's longstanding relationship with Raycom, much less explore the implications for whether a *de facto* transfer has occurred. Finally, even if Mr. Fink were inclined to exercise independent editorial control over programming on KFVE, it is impossible to see how he could do so. KFVE only has two employees, no production facilities, no studio, no tower, and very limited resources to procure programming.

B. Personnel:

The Order acknowledges that KFVE only has two employees, but finds that two employees provide a "meaningful staff presence" as required by the main studio rule."[63] But as MCH pointed out, whether a station complies with the main studio rule is an entirely different question than whether the station is under *de facto* control of another.[64] It is difficult to imagine how two individuals can operate a television station, especially when other stations have upwards of 60 employees.

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[62] April 1, 2011 *ex parte* at 5.
[63] Order at ¶20.
[64] MCH Reply, at 6-7 (Oct. 23, 2009).

Moreover, it is undisputed that Raycom employees will sell advertising on KFVE. The Bureau notes that the

> Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and to comply with the minimum staffing requirements set forth in the main studio rule. Section 1(b)(ii) of the Shared Services Agreement provides that HITV will "direct and control the employees performing services [] relating to the sale of television advertising."[65]

This analysis looks solely at the "rights" stated in the Shared Services Agreement rather than what is actually occurring, as required by FCC policy.[66]

C. Finances

The Bureau's analysis of the complex financial arrangements is likewise superficial and incomplete. Under the Commission decision in *Ackerley*, a key consideration in whether a *de facto* transfer has occurred is whether the licensee retains the economic incentive to control programming.[67] MCH showed that HITV lacks the economic incentive to control programming under both sets of agreements. Under the original agreements, which were in effect from November 2009 until October 2010, Raycom was entitled receive to up to 90% of KFVE's monthly profits. Furthermore, using the confidential figures provided by Raycom and HITV, MCH determined that in fact, Raycom received approximately that percentage of KFVE's cash flow.[68]

Under the amended Agreement, which took effect in November 2010, Raycom is entitled to 30% of KFVE's monthly cash flow, but HITV must also pay Raycom a flat monthly fee in the

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[65] Order at ¶20 (citations omitted).

[66] *See, e.g., Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8514, (1995).

[67] 17 FCC Rcd 10828, 10841 (2002).

[68] *See* MCH Response, at 4 (June 7, 2011)(filed under protective order).

amount of $208,333.[69] The actual figures for the four month period during which the licensees provided financial data showed that, in fact, far more than 30% of KFVE's cash flow accrued to Raycom.[70]

The Bureau does not dispute MCH's analysis, but nonetheless inexplicably "conclude[s], based on the entire record before us, that the payment terms operate in a manner that aligns the profits arising from operation of the station with HITV's ownership and, thus, HITV has had sufficient economic incentive to control programming aired on Station KFVE(TV), *both prior to and after the October 2010 revisions*."[71] (emphasis added). The Bureau order provides no analysis to support its conclusion about the financial arrangements prior to October 2010.

Regarding the period after October 2010, the Bureau finds that that "[a]ccording to the terms of the revised agreements, HITV retains 70% of cash flow resulting from operation of the station, a split the staff has previously approved."[72] But the Bureau brushes aside MCH's showing that that HITV actually retained a much lower percentage when the flat fee was taken into account, noting that the Bureau has "approved previous relationships where a flat fee for services rendered, as part of a shared services agreement, was combined with a split of advertising revenue."[73]

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[69] Under the Amended Studio Lease and Shared Services Agreement, HITV must pay Raycom 15% of its monthly cash flow as a studio fee *plus* another 15% of cash flow as a performance fee *plus* a flat fee of $208,333. *See* Amended Shared Services Agreement, Sched. B (defining service fee and performance fee).

[70] MCH Response, at 5 (June 7, 2011)(filed under protective order).

[71] Order at ¶ 19.

[72] *Id.*

[73] *Id.* & n.40, citing *Malara Broadcast Group of Duluth Licensee,* 19 FCC Rcd at 24076. As noted supra, an application for review of this Bureau decision is still pending. In any event, Malara ruling does not provide sufficient detail to determine whether the two factual situations are really comparable.

In sum, the Bureau's determination that Raycom does not exercise *de facto* control over KFVE, is based on the uncritical acceptance of claims made by the licensees while ignoring contrary evidence presented by MCH. The Bureau's erroneous finding regarding control over programming, personnel, and finances infect the entire analysis and should be reviewed by the Commission in full.

V. Conclusion

The Commission should take this opportunity to rule on a novel question of law with important implications for its broadcast ownership rules as the extent of competition and viewpoint diversity available to the public in Hawai`i and in many other areas. MCH respectfully urges the Commission to reverse the Bureau Order and to issue an order to show cause why Raycom and HITV should not have their licenses revoked for repeated violations of Communications Act, the FCC rules, and the duty of candor.

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December 27, 2011

CERTIFICATE OF SERVICE

I, Angela J. Campbell, hereby certify that copies of the attached "Application for Review," have been served by first-class mail, postage paid, this 27th of December, 2011, on the following persons at the addresses shown below.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
KHNL/KGMB License Subsidiary, Inc.	)	Fac. ID Nos. 34867 and 34445
	)	
Licensee of Stations KHNL(TV) and	)	
KGMB(TV), Honolulu, Hawaii	)	
	)	
And	)	
	)	
HITV Licensee Subsidiary, Inc.	)	Fac. ID No. 36917
	)	NAL Acct. No. 201141410015
Licensee of Station KFVE(TV), Honolulu, HI	)	FRN No. 0016152480

To: Commission

JOINT OPPOSITION TO APPLICATION FOR REVIEW

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SUMMARY

In November 2011, in response to a complaint filed by Media Council Hawaii ("MCH") in October 2009, and after reviewing and analyzing a voluminous factual record, the Commission's Media Bureau correctly decided that, contrary to MCH's claims, agreements between Raycom Media, Inc. ("Raycom") and HITV License Subsidiary, Inc. ("HITV") to exchange non-FCC-licensed assets and to supply support services to HITV's station KFVE(TV) did not violate the Communications Act or Section 73.3555(b), the Commission's duopoly rule. Applying long-standing Commission precedent pertaining to the agreements between Raycom and HITV and to the exercise of the operators' respective obligations under those agreements, the Media Bureau held that Raycom had not acquired *de facto* control over HITV's KFVE(TV). The Bureau also found, consistent with the plain language of the duopoly rule, that an exchange of affiliations and other programming and operation-related assets—an exchange not requiring FCC application—did not violate the rule's "top-four" restriction.

MCH's Application for Review seeks reversal of the Media Bureau's decision on two grounds. It claims that the Bureau's holding that there was no *de facto* transfer of control of KFVE(TV) to Raycom rests on erroneous material factual findings, and it claims that, despite the duopoly rule's clear language stating that the top-four restriction applies only "at the time of application," the Media Bureau lacked authority to conclude that the Raycom-HITV programming exchange agreement does not violate the rule. But the Application does not identify a single material factual error in the Bureau's holding that HITV retained control over KFVE(TV)'s personnel, programming, and finances. Nor does MCH demonstrate that the Bureau erred in applying the duopoly rule's "application" requirement to reject MCH's top-four violation claim. The Commission should also affirm the Media Bureau's sound decision not to accept MCH's invitation to change the media ownership rules through this adjudication, but rather to give all interested parties notice and an opportunity to comment on the issue in a prospective rulemaking that is already pending at the FCC. Accordingly, the Commission should summarily reject the MCH Application.

I. BACKGROUND

In 2009, Raycom and HITV, two independent broadcasters with television stations licensed to serve the Honolulu, HI community, negotiated a series of arms-length agreements.[1] Under the Agreements, HITV acquired the rights to MyNetwork and other programming, including highly valued University of Hawaii sports, that previously aired on Raycom's Channel 23. Raycom acquired rights to CBS and other programming that previously aired on HITV's Channel 22. The two stations also swapped call signs to avoid viewer confusion, so that HITV's Channel 22 would be called KFVE(TV) and Raycom's Channel 23 would be called KGMB.[2] Under a Shared Services Agreement and a separate Studio Lease, Raycom agreed to provide to HITV's station KFVE, for a fee, local news programming at the times and in the amounts requested by HITV; certain back-office support services; a team of leased employees (reportable only to HITV) for HITV to handle its own advertising sales; and studio, production and certain other facilities. Under the Agreements, HITV pays KFVE(TV)-

[1] The agreements entered into in October 2009 and as subsequently revised in certain respects (collectively referred to here as the "Agreements") were filed by Raycom and HITV as part of the record before the Commission.

[2] In return for HITV's CBS affiliation and other non-FCC assets, Raycom agreed to pay HITV \$22 million under a Term Loan Note, with a balance due on October 1, 2016. Raycom also acquired an option to purchase KFVE(TV), which it later assigned to an entity now known as American Spirit Media.

related expenses, including for KFVE(TV) programming, before Raycom receives fees for its services.[3] Under the Agreements, all services provided by Raycom are subject to the supervision and control of HITV. Raycom and HITV did not exchange any FCC authorizations, nor were any applications for FCC approval necessary.[4]

The arrangement was necessitated by a historically poor advertising market in Hawaii. Local television revenues had dropped 30% in three years, the local Fox affiliate filed for bankruptcy, and Raycom's Honolulu stations expected nearly $2 million in negative cash flow in 2009, increasing losses to nearly 300% over the previous year. And, less than a year after Raycom and HITV entered into the Agreements, the leading newspaper in Hawaii, the *Honolulu Advertiser*, closed after more than 150 years.[5] The Agreements were intended to help prevent severe service and staff reductions that otherwise would have become necessary at Raycom's and HITV's respective stations.[6] And under the Agreements, as KFVE(TV) performed better financially, HITV shared in that performance, thus ensuring HITV and its owner MCG Capital Corporation had a continued interest in KFVE(TV)'s success.

The Agreements were carefully designed to hew closely to a long line of prior FCC decisions at the Commission and Bureau level approving similar arrangements between independent broadcasters. These decisions hold that such agreements are consistent with the

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[3] Under the revised agreements, provided KFVE(TV)'s cash flow is sufficient, Raycom receives a "Flat Fee" for the services that it provides KFVE(TV), and a "Performance Fee" and "Lease Fee" that amount to 30% of KFVE(TV)'s cash flow. HITV retains 70% of its cash flow, out of which it pays the Flat Fee. If HITV's cash flow is insufficient to pay the Flat Fee after payment of other station expenses, then Raycom receives a lesser amount equal to KFVE(TV)'s monthly cash flow above $25,000, which HITV retains. Any monthly shortfall does not carry over. As noted, KFVE(TV)'s expenses are all paid before calculation of Raycom's fees.

[4] *See generally* Raycom-HITV Joint Response to "Supplement," June 8, 2010, at pp. 5-10.

[5] *See generally id.* at pp. 3-5.

[6] *Id.*

Communications Act and duopoly rule and serve the public interest so long as the licensee retains ultimate control over its station. Shared services agreements reduce operating costs and improve cost-effectiveness of often-struggling licensees in challenging markets that otherwise may be unable to continue to afford airing news and providing other public service benefits.[7] They thus permit broadcasters to sustain and improve, rather than diminish, service to their viewing communities. Relying on this body of case law, the Shared Services Agreement between Raycom and HITV mirrored provisions in those agreements that the Commission has approved.[8] The Agreements explicitly retained HITV's ultimate control over KFVE(TV)—control which KFVE(TV)'s General Manager has consistently exercised in his programming and other decisions. It also preserved HITV's economic incentive to ensure KFVE(TV) competes for viewers and advertising in the Honolulu market. The arrangement has resulted in tangible public interest benefits for viewers in Honolulu, including award-winning news coverage by the largest news operation in the market led by the former editor of Honolulu's largest newspaper, local cultural programming airing exclusively on KFVE(TV), and three separate newscasts on KFVE(TV) airing at a time when other stations in the market do not air news.[9]

In November 2011, in response to a complaint filed by MCH in October 2009, and after reviewing a record that included a number of pleadings, the Agreements, Raycom and

[7] *See, e.g.*, Reply Comments, Coalition to Preserve Local TV Broadcasting, July 26, 2010, MB Docket No. 09-182, at pp. 11-24 (demonstrating how shared services agreements result in more news, particularly in financially challenged markets).

[8] *See* Raycom-HITV Joint Reply to June 7, 2011 *Ex Parte* Response, June 23, 2011, at p. 3 (demonstrating that the provisions in the Raycom-HITV SSA mirrored those the FCC had approved as retaining ultimate control in the licensee). Unlike several of the arrangements previously reviewed and approved by the Commission, the Raycom-HITV arrangement does not include a joint sales agreement for selling time on KFVE(TV). Instead, as noted, HITV has a sales team that handles all advertising sales. This team is screened from employees selling time on Raycom stations. HITV also retains a separate national sales rep firm.

[9] *See* Raycom-HITV Joint Response to "Supplement," June 8, 2010, at pp. 10-13.

HITV responses to staff requests for additional factual information (including confidential financial data), and several rounds of *ex parte* filings, the Commission's Media Bureau decided, contrary to MCH's assertions, that no *de facto* transfer of control of KFVE(TV) to Raycom had occurred and that the programming exchange arrangement did not violate the duopoly rule's top-four restriction. Memorandum Opinion & Order and Notice of Apparent Liability for Forfeiture, *In re KHNL/KGMB License Subsidiary and HITV*, rel. Nov. 25, 2011 ("Decision"), at pp. 6-9.[10] As to control, the Bureau found that the Agreements "do not create an unauthorized transfer of control under relevant precedent," that "HITV does, in fact, exercise programming control over Station KFVE(TV)," that "HITV has had sufficient economic incentive to control programming aired" on KFVE(TV), and that "HITV has not relinquished control" over KFVE(TV)'s personnel. *Id.* at pp. 6-7, ¶¶ 17-20. As to the duopoly rule, the Bureau found that it had not been violated because the rule's bar on a single entity owning two top-four-ranked stations in a market applied "at the time of application," and here, because "no outright transfer of a license has occurred, ... no application was required." *Id.* at pp. 7-8, ¶¶ 21-23. The Bureau concluded, properly, that the Commission should not consider changing the law retroactively in this case, and, instead, that it should include "in the ongoing 2010 quadrennial [media ownership] proceeding the duopoly rule issues that this and similar cases raise." *Id.* at p. 8, ¶ 23.

II. ARGUMENT

As set out in its Application for Review (hereinafter "App."), MCH claims two bases for Commission reversal of the Bureau's Decision: (1) that the Media Bureau's determination that Raycom does not exercise *de facto* control over KFVE(TV) is based on

[10] The Bureau also found HITV apparently liable for its failure to ensure KFVE(TV)'s public file was accessible during business hours. Decision, pp. 10-11, ¶ 27. HITV has paid the fine.

erroneous findings of material facts; and (2) that the Bureau's determination that the Raycom-HITV arrangement does not violate the current top-four restriction of the duopoly rule exceeds the Bureau's delegated authority. MCH fails to meet its burden as to either claim. As it has throughout this proceeding, MCH also makes a number of policy-based arguments in favor of changing the law to buttress its claims, but as the Media Bureau found, the 2010 media ownership proceeding is the proper context in which to consider these arguments. Indeed, now that the Commission's Notice of Proposed Rulemaking (MB Docket No. 09-182 and 07-294) has expressly teed up these rulemaking issues, it is even clearer that these issues should be resolved in that proceeding.

A. The Media Bureau Made No Erroneous Findings of Material Fact in Resolving the *De Facto* Control Question.

MCH seeks reversal of the Media Bureau's determination that Raycom does not exercise *de facto* control over KFVE(TV). But the Application fails to allege meaningful error in the Media Bureau's factual findings concerning KFVE(TV)'s programming, finances, and personnel—the three areas identified by the Commission as key to determining whether a transfer of control has taken place. To be sure, MCH disagrees with the ultimate *legal conclusions* the Bureau correctly drew from those facts—*i.e.,* that, consistent with Commission precedent, HITV has retained control over KFVE(TV)'s programming, personnel, and finances, and has incentive to control KFVE(TV)'s operations.[11] But an applicant's disagreement with the

[11] MCH's claim that the Bureau discussed each *de facto* transfer-of-control factor in "one or two paragraphs" (App., at p. 15) is not a proper basis for granting its Application. And the implication that the Bureau's analysis in this proceeding was facile or superficial should be rejected. Indeed, the Bureau pointed out that the record which it examined in this case was "unique in that the staff has reviewed both the specific language of the various agreements, along with financial data indicating how the various payment terms have operated … ." Decision, at p. 7, ¶ 19. Even MCH acknowledges that the Bureau engaged in a "lengthy factual investigation." (continued…)

Bureau's legal analysis of undisputed facts is not the same as showing the findings of those facts were erroneous, and thus is not grounds for granting an application for review.

1. The Bureau properly found that HITV exercises control over KFVE(TV)'s programming.

Based on a close review of the record before it, the Media Bureau properly found, *inter alia*, that since Raycom and HITV entered into the Agreements: (1) KFVE(TV) has exercised its right to reject network programming from MyNetwork TV under its affiliation agreement in favor of locally focused programming such as University of Hawaii sports or local cultural performances; (2) the news programming that Raycom provides at times and in the amounts that HITV requests constitutes only 6.5% of KFVE(TV)'s weekly programming; (3) KFVE(TV)'s General Manager "writes and delivers two editorials that are aired four times weekly";[12] (4) KFVE(TV)'s General Manager "must make weekly programming reports to HITV's corporate headquarters"; and (5) KFVE(TV)'s General Manager has sought syndicated programming, including locally produced programming, to air exclusively on KFVE(TV). Decision, at p. 7, ¶ 18. All of these facts, the Bureau persuasively concluded, demonstrated that HITV exercises programming control over KFVE(TV). *Id.*

MCH fails even to allege that any of these factual findings are incorrect, which is itself a sufficient basis for the Commission to deny MCH's Application. *See, e.g.*, *In re Morris Commc'ns, Inc.*, 23 F.C.C.R 3179, 3196 (2008) (Auctions Division did not make errors of fact

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App., at p. 3. And that "factual investigation" included responses to a number of additional factual requests from Bureau staff after an initial round of pleadings and written *ex partes*—all of which MCH had a full opportunity to review and respond to. *See id.* at p. 7, ¶ 1.

[12] MCH's factually erroneous argument concerning the KFVE(TV) General Manager's editorials is discussed *infra* at p. 11.

where, *inter alia*, Commission found "no indication that the Division misconstrued any of [applicant]'s factual assertions"). Rather than demonstrate error as to the material facts that the Bureau *did* find, MCH claims that the Bureau should have found that Raycom controls the programming on KFVE(TV) because of *other* factors that the Commission has never before found relevant to a *de facto* transfer of control—*i.e.*, alleged similarities between the issues covered by the news programming Raycom aired on its own stations and those covered in the news programming Raycom provided to HITV under the Agreements. MCH does not offer any Commission precedent finding that such alleged similarities are relevant to, much less dispositive of, a *de facto* transfer of control. Furthermore, MCH's continued assertions that the news programming on KFVE(TV) is "simulcast" (App., at p. 16) are as incorrect now as they were when MCH filed its Complaint.[13] And, in fact, these assertions are belied by MCH's own Application for Review. *See* App., at pp. 16-17 (study finding that KFVE(TV)'s November 11, 2011 coverage of a helicopter crash on Hawaii's Moloka'i island included "more information" and "new video"). MCH also claims that KFVE(TV) "has never rejected a local newscast provided by Raycom." App., at p. 18 (emphasis in original). But even if this claim were dispositive or even relevant to the programming control question that the Bureau decided—which it is not—it is demonstrably false. *See* Raycom-HITV Joint *Ex Parte* Letter, April 1, 2011, HITV Response at Annex A, at p. 5 (affirming that "[i]n December 2010, KFVE declined Raycom's offer of extended live local news coverage of the visit of President Obama to Hawaii").

[13] *See, e.g.*, Raycom-HITV Joint *Ex Parte* Letter, April 1, 2011, HITV Response at Annex A, at p. 2 (newscasts are "branded specifically for KFVE with input and direction from KFVE," are "not reruns or simulcasts of Raycom station newscasts," "KFVE retains ultimate authority as to the time periods during which they air," and "Raycom has also made available special news-related programming").

MCH also criticizes the Bureau for not drawing an adverse conclusion from the fact of KFVE(TV) General Manager John Fink's former employment with Raycom. *See* App., at p. 18. Clearly, this is not a misstatement of fact on the Bureau's part. But the Bureau's "failure" to do so—and especially its decision not to "explore the implications" of that prior relationship on the issue of Mr. Fink's independence from Raycom, *id.*—is not grounds for reversal, particularly where the Commission has previously rejected similar "speculation" regarding a party's current involvement in station operations based on that party's prior relationship. *See In re Sevier Valley Broadcasting*, 10 F.C.C.R. 9795, 9797 (1995) (rejecting argument that a spouse's "past involvement" in husband's companies "demonstrate[s] her participation in the financial, programming, and personnel decisions of [husband's current] stations"). To win reversal of the Bureau's decision, MCH must demonstrate material factual error on the Bureau's part, not a "failure to explore" the speculative "implications" of Mr. Fink's independence based solely on his former employment.[14] *Id.*

Finally, MCH's claim in its Application that "all three stations ran the same editorials" (App., at pp. 17-18, citing May 23, 2011 MCH *ex parte*) is based on another misreading of the record, which Raycom and HITV have previously demonstrated. As reflected in the revised Issues/Programs lists that HITV and Raycom provided to the Commission, Raycom General Manager Rick Blangiardi's editorials have aired only on Raycom's stations, and KFVE(TV) General Manager John Fink's editorials have aired only on KFVE(TV).[15]

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[14] MCH provides no factual basis for its speculation that Mr. Fink would be controlled by Raycom because of the prior relationship.

[15] *See* Raycom-HITV Joint *Ex Parte* Letter, April 22, 2011, at Annexes A-2 (HITV Station Revised I/P Lists, at pdf pp. 91, 93, 95-96, 98-99, 102, 103-05, 107, 109-18, 120, 123-24, 129-31, 132, 133-34, 135, 138, 141-43, 147, 149-51, 152, 154, 155-56, 157, 159, 163-64, 167-68, (continued…)

2. *The Bureau properly found that HITV controls KFVE(TV)'s personnel.*

MCH's Application is similarly deficient with respect to its allegations that Raycom controlled KFVE(TV)'s personnel. The Bureau correctly found, consistent with longstanding precedent, that KFVE(TV)'s two full-time employees—a full-time on-site General Manager and a full-time on-site General Sales Manager—both of whom are employed by and report solely to HITV, are sufficient for HITV to have retained personnel control. *See* Decision, p. 8, ¶ 20 (finding that as per Commission rules, two full-time employees constitute a "meaningful staff presence").[16] MCH does not demonstrate that this finding, as either a factual or legal matter, was wrong. Rather, it speculates that "it is difficult to imagine how two individuals can operate a television station." App., at p. 18. Regardless of MCH's "difficulty in imagining" how FCC precedent that has been clearly established for decades can be correct, however, it remains true that the Bureau did not err in finding that KFVE(TV) had two full-time employees that were exclusively controlled by HITV, or in concluding that this fact demonstrated that HITV retained control over KFVE(TV). In addition, MCH's claim that "two individuals are operating" KFVE(TV) is a misstatement of the record. The Agreements and

169-70, 174, and 177, all discussing and listing Fink editorials) and B-2 (Raycom Station Revised I/P Lists, at pdf pp. 20-21, 25, 30-31, 34-35, 37, 42, 47-48, 51-53, 59, 66, 72-73, 80-83, 96, 106-07, 112-14, 118-19, and 128, all discussing and listing Blangiardi editorials); *see also* Raycom-HITV Joint *Ex Parte* Letter, April 1, 2011, HITV Response at Annex A (Fink's editorials are "writ[ten] and present[ed] for exclusive airing on KFVE"); Raycom-HITV Confidential Joint Reply to June 7, 2011 *Ex Parte* Response, June 23, 2011, at p. 5, n. 6 (pointing out MCH's erroneous claim that all three stations run the same editorials is based on a misreading of the record and stating that "[s]ince the parties entered into their sharing arrangement, no editorial by John Fink has aired on a Raycom station, nor has any editorial by a Raycom General Manager aired on KFVE."). The April 22, 2011 *ex parte* letter noted that the revised reports reflected the programming that actually aired on both stations.

[16] *See also, e.g., Clear Channel Licenses, etc.*, 22 F.C.C.R. 21,196, 21,206 (2007) ("*Ackerley II* decision"); *Malara Broadcast Group of Duluth Licensee*, 19 F.C.C.R. 24,070, 24,072 (M.B. 2004), application for review pending; *Nexstar Broadcasting, Inc.*, 23 F.C.C.R. 3528, 3533 (M.B. 2008); *Chelsey Broadcasting Co. of Youngstown, LLC*, 22 F.C.C.R. 13,905, 13,908 (M.B. 2007), application for review pending.

record of performance under them make clear that KFVE(TV) has a four-member sales team reporting directly to and under the control of HITV, and that the advertising sales employees Raycom leases to HITV work full-time and on-site to sell time exclusively on KFVE(TV).[17] These employees are headed by KFVE(TV)'s General Sales Manager, and have no responsibilities to any other station.[18] An application for review must rely on more than the applicant's imaginings and false inferences. A request for full Commission reversal must demonstrate error. MCH has failed to do so.

MCH's allegation regarding the employees that Raycom leases to HITV to sell advertising exclusively on KFVE(TV) under the Agreements is even more speculative. It argues that the Bureau erred by looking "solely" at the Agreements instead of "what is actually occurring." App., at p. 9. But even assuming that looking to the parties' agreements to discern their intent is error when no countervailing evidence exists—which it is not[19]—the Bureau expressly stated that its decision was based on both the "agreements as revised[] *and the entire record before us.*" Decision, at p. 8, ¶ 20 (emphasis added). Raycom and HITV affirmed that in practice, as well as a matter of contractual arrangements, that the leased employees report

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[17] *See* Decision, at p. 5, ¶ 12; *id.*, p. 8, ¶ 20 ("The Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and to comply with the minimum staffing requirements set forth in the main studio rule.") (citing *Nexstar* at 3533 and other cases).

[18] In addition, KFVE(TV) maintains its own separate national rep firm, and Raycom sells no advertising time on KFVE(TV).

[19] In every sharing arrangement case, the Commission "focuses closely on the intention of the parties, as expressed in their relevant agreements." Raycom-HITV Joint Response to "Supplement," June 8, 2010, at p. 16, citing *Nexstar* at 3533, *Malara* at 24,706, *Piedmont Television of Springfield License LLC*, 22 F.C.C.R. 13,910, 13,193 (M.B. 2007), application for review pending, and *SagamoreHill of Corpus Christi Licenses, LLC*, DA 10-495, 2010 WL 1143116, at *4 (M.B. March 16, 2010). It is thus uncontroversial that the Bureau would look to the Agreements here to determine whether Raycom obtained *de facto* control over KFVE(TV)'s personnel.

directly and solely to HITV. *See* Joint *Ex Parte* Response to "Supplement," June 8, 2010, at p. 19 and Exhibits A and B (declarations from Raycom and HITV executives affirming to facts stated in pleading). MCH has not demonstrated or even alleged any error as to these facts. And "absent specific factual support to the contrary," the Commission does "not speculate that an applicant will act illegally." *In re Univision Applications*, 7 F.C.C.R. 6672, 6674, ¶ 12 (1992); *see also id.* (petitioners "predict that the Buyer will depart from its representations," but "that position is based solely on inferences drawn from material on file with the Commission and is not supported by any additional allegations of specific facts that would lead to a conclusion that the Buyer will not abide by its representations"); *see also Sevier Valley Broadcasting*, 10 F.C.C.R. at 9797 (no error shown where applicant failed to "provide[] any evidence that [licensees] will not, in fact operate their stations independently as asserted in their declarations").

3. The Bureau properly found that HITV retains a financial interest in KFVE(TV)'s success.

Finally, as to the financial aspects of the Raycom-HITV arrangement, MCH again claims error not as to the Media Bureau's factual findings regarding KFVE(TV)'s finances, but as to the conclusion the Bureau drew from those findings. The Bureau found that even though HITV pays Raycom a post-expenses "Flat Fee" after receiving its share of the "cash flow resulting from the operation of the station," this arrangement was consistent with precedent. The Bureau thus concluded that, as with similar arrangements it had previously examined, the financials of the Raycom-HITV arrangement "operate to provide HITV with economic incentive to control its programming, *despite the Flat Fee*." Decision, at pp. 8-9, ¶ 19 (emphasis added).[20]

[20] *See also Malara* at 24,076 (contractual post-expenses fee for services combined with advertising revenue split did not indicate broker control); *SagamoreHill* at 2810; *Nexstar* at 3534.

Despite MCH's claims, it has not presented "contrary evidence" as to these facts, but rather argues for a contrary conclusion—that this financial arrangement does not give HITV sufficient incentive to control KFVE(TV)'s operations. *See* App., at p. 20 (taking issue with Bureau's "analysis" and "conclusion[s]" regarding the financial arrangement). This does not allege an erroneous finding of fact.

B. The Media Bureau's Decision Properly Relied On a Prior Commission Decision Concerning the Applicability of the Duopoly Rule's Top-Four Restriction.

MCH argues that by virtue of the exchange of affiliations between Raycom's and HITV's stations, the top-four proscription of the Commission's duopoly rule was violated. MCH claims that the Bureau's decision that the Raycom-HITV arrangement does not violate the rule should be reversed because MCH's Complaint (1) "involves an important question of law or fact which has not previously been resolved by the Commission," and (2) "presents a novel question that can only be decided by the Commission." App., at pp. ii, 2. The first of these arguments is incorrect. The second is both wrong and irrelevant to an application for review.

1. The duopoly rule demonstrates that MCH's complaint does not present a question that "has not previously been resolved by the Commission."

MCH urges reversal based on a mistaken claim: that the Commission has not previously spoken regarding the limitation of the applicability of the duopoly rule's "top-four" restriction to the context of a television station acquisition. As the Media Bureau found in its interpretation of the rule's scope, both the rule and the 1999 *Report and Order* adopting it are clear:

> An entity may directly or indirectly own, operate, or control two television stations licensed in the same DMA [if] … *at the time of the application to acquire*

> ... *the station is filed,* at least one stations is not ranked among the top four stations in the DMA ... .

47 C.F.R. § 73.3555(b)(2)(i) (emphasis added). The Commission order adopting the rule was similarly unequivocal. *See* Report & Order, *Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903 (1999), 12,907, ¶ 8 (stating that ratings for top-four proscription are "measured ... at the time the application is filed"); *id.* 12,931, ¶ 59 (same); *id.* 12,933, ¶ 64 (stating that "if an entity acquires a [permissible] duopoly ... it will not later be required to divest if ... the two merged stations subsequently are both ranked among the top four stations in the market").

The plain language of the rule thus makes clear that the Commission intended that compliance with the top-four standard should be determined "at the time the application to acquire ... the station is filed." And because here "[n]o outright transfer or assignment of a license has occurred, ... no application was required." Decision, at p. 9 n. 48. The duopoly rule's top-four restriction thus does not apply to the Raycom-HITV arrangement. MCH misstates the scope of the rule when it contends that it "prohibits common control of more than one or two television stations within the same market and common control of more than one top-four ranked station." App., at p. 1. This may be the local television rule MCH would like to have in effect, but it is not the duopoly rule that is, in fact, in effect.

MCH's efforts to read "at the time the application is filed" out of the duopoly rule's plain language confirm the Media Bureau's conclusion that the Commission's 2010 Quadrennial Ownership Review is the proper forum to consider MCH's arguments for revising the current rule. In the Quadrennial Review NPRM, released after the Bureau's decision in this case, the Commission itself concludes, in accordance with the Bureau's analysis here, that under the current duopoly rule, market ranks "are to be determined '[a]t the time of application to acquire or construct the station," and thus "[t]he Commission's local television ownership rule intends, then, to prohibit an entity from *acquiring* two top-four stations." Notice of Proposed Rulemaking, *2010 Quadrennial Regulatory Review*, MB Docket No. 09-182 et al., FCC 11-186 (Dec. 22, 2011) ("2010 Ownership NPRM"), ¶ 44 (emphasis added). In light of the restriction of the applicability of the top-four proscription, the Commission continued, "a broadcaster that owns two television stations located in the same market will *not* be required to divest a station 'if the two merged stations subsequently are both ranked among the top four stations in the market.'" *Id.*, quoting 1999 Duopoly Rule Order. This is necessarily also the rule if a broadcaster exchanges network affiliations and other assets whose transfers have never been within the FCC's regulatory review. *See* 2010 Ownership NPRM, at ¶ 45 ("no application ... required" for a transfer of network affiliation and call signs that results in a single entity controlling two top-four stations in a market); Decision, at p. 8 n. 46 (noting that "a licensee need not acquire Commission consent to change network affiliation") (citing 47 C.F.R. § 73.3613(a)(1)); *id.*, at p. 6 n. 25 ("Parties seeking to exchange call signs need not file an application.") (citing 47 C.F.R. § 73.3550(a)).

Yielding to MCH's attempt to change the duopoly rule through this adjudication would be contrary to well-settled administrative law. The Commission may announce new principles in an adjudicative proceeding such as this one, but cannot do so to impose "some new liability ... on individuals for past actions which were taken in good faith reliance on [agency] pronouncements," which is unquestionably the case here. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). Moreover, "rulemaking is generally a better, fairer, and more effective method of implementing a new industry-wide policy than uneven application of conditions in isolated [adjudicatory] proceedings." *Community TV of S. Calif. v. Gottfried*, 459 U.S. 498, 511 (1983) (quoted in Decision, p. 9, fn. 49). And there should be no doubt that MCH's Complaint seeks industry-wide relief. *See* App., at p. 12 (Complaint raises "an important matter of policy" and seeks a ruling that would "stop other stations" from entering into similar arrangements"); *id.* at p. ii (Commission should grant review because "there are many other stations around the country where stations are utilizing similar agreements"); *id.* at p. 21 (Complaint has "important implications" for "Hawai'i *and in many other areas*") (emphasis added). MCH thus seeks to change the relevant law not only as to Honolulu, but as to the 83 markets in which it counts "sharing arrangements of various types." App., at p. 14. These are quintessential rulemaking questions.[21]

"Judicial hackles are raised when an agency [through adjudication] alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates." *American Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006). Thus, a rule changed through adjudication "may justifiably be given [only prospective] effect in order to protect the settled expectations of those who had relied on the preexisting rule." *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). MCH argues that the Commission should punish Raycom and HITV for entering into an arrangement that "the Commission did not appear to contemplate" when adopting the duopoly

[21] Those other parties that would be affected by the relief MCH seeks here would not be afforded notice or an opportunity to comment on the change to the duopoly rule that MCH is proposing—yet another point demanding that MCH's concerns be addressed via the current Quadrennial Review. *See Capital Cities/ABC, Inc.*, 11 F.C.C.R. 5841, 5888 (1996) (inappropriate to address arguments to reexamine ownership rules in an adjudicatory proceeding "where third parties, including those with substantial stakes in the outcome, had no opportunity to participate, and in which [the Commission], as a result, have not had the benefit of a full and well-counseled record"); Raycom-HITV Joint Response to "Supplement," June 8, 2010, at pp. 3-4; Administrative Procedure Act, § 553(b)(c).

rule in 1999. App., at p. 12. If the duopoly rule needs to be revised for previously uncontemplated situations, or brought in line with its "purpose and intent" (*id.*), then the proper venue for doing so is the 2010 Quadrennial Review—not MCH's Complaint. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446, 447 n.79 (D.C. Cir. 1982) ("the question whether regulations are ... defective is one worthy of notice and an opportunity to comment").

2. A challenge to the scope of the Media Bureau's delegated authority is not a valid basis for seeking Commission reversal of the Decision.

MCH's "novelty" argument conflates two distinct factors: (1) the "has not previously been resolved by the Commission" application-for-review factor analyzed above, *see* App., at p. 10 (citing 47 C.F.R. § 1.115(b)(2)(ii)), and (2) the scope of the FCC's delegation of authority to the Media Bureau. That delegation states that the Bureau should refer to the full Commission "matters that present novel questions of law, fact, or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.283(c). This attempt at bootstrapping should be rejected. The mere fact that two other applications for review have been filed that, according to MCH, "raise the same question" as this case, *see* App., at p. 13, fails to demonstrate that the Raycom-HITV arrangement presents "novel questions" that the Bureau was barred from passing on in the first instance. In fact, resolving "complaints" involving "the regulation ... of broadcast media" is squarely and expressly within the Bureau's delegated authority. 47 C.F.R. § 0.61. MCH's attempt to distinguish the facts of this case from previous cases does not demonstrate that the questions presented by its Complaint are outside of the Bureau's delegation. And even if the scope of the Media Bureau's delegation were relevant here, as demonstrated above the Bureau correctly determined that this case should be "resolved under existing precedents and guidelines"—namely, the plain language of the duopoly rule.[22]

C. The Relief MCH Seeks is Unprecedented and Contrary to the Public Interest.

In the end, the only "novel" aspect of MCH's Application for Review is its requested relief. Its request for a "standstill order" that would "enjoin Raycom and MCG from taking any further action pursuant to the Agreement" (App., at p. 3) would have the effect of stripping news and other locally produced programming off of KFVE(TV).[23] This would constitute an extralegal and unwarranted expansion of FCC authority. It would deprive Honolulu viewers of emergency weather information and other valued services, and would return the public's television service to a state of financial instability and precariousness, which would be inconsistent with the public interest.[24] MCH's requested "standstill order" would also raise constitutional issues. Because the U.S. Supreme Court and the Commission have recognized for decades that programming decisions constitute protected speech, a "standstill order" would

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[22] *See also In re KGSW-TV*, 8 F.C.C.R. 159, ¶ 4 n. 5 (1992) (where "resolution of the issues in a case, both legal and technical, are rooted in Commission precedent ... the staff is able to act"). MCH's claim that the full Commission has never previously considered or approved issues similar to those raised in the pending applications for review simply ignores the Commission's *Ackerley II* decision. *See* note 16 *supra.*

[23] By arguing that the FCC should not enter MCH's requested "standstill order," Raycom and HITV in no way concede that the Commission has the authority to enter such an order. *See, e.g.*, Raycom Response to Complaint, Oct. 16, 2009, at pp. 10-12 ("Mere speculation that a violation of the [Communications] Act *might* occur is not sufficient" for FCC to enter a cease-and-desist order, and that such an order cannot be entered as interim relief as MCH requests here) (quoting 47 U.S.C. § 312(b)).

[24] *See* Raycom-HITV Joint *Ex Parte* Letter, April 22, 2011, at Annex A-2 (HITV Station Revised I/P Lists, at pdf pp. 108, 116) (discussing hour-long special and 16-hours-long coverage of approaching tsunami that aired on KFVE(TV) during the first quarter of 2010).

violate KFVE(TV)'s First Amendment rights.[25] Depriving Raycom and HITV of their rights under the Agreements would be even more inappropriate now than it would have been at the time of MCH's initial Complaint, since the Bureau has found that the arrangements complied with the duopoly rule. *Cf.* 47 U.S.C. § 312(b) (order permissible only when a licensee "has violated or failed to observe any rule or regulation of the Commission"). And MCH's Application fails to even mention, much less raise as a ground for reversal, the Bureau's correct determination that MCH's request for injunctive relief is mooted by virtue of the Bureau's resolution of this case.

III. CONCLUSION

MCH's Application for Review provides no basis for reversing the Media Bureau's decision to deny the MCH Complaint. Accordingly, the Application should be denied.

Respectfully submitted,

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January 11, 2012

[25] *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 124 (1973); *Hunger in America,* 20 F.C.C. 2d 143, 150-51 (1969); *American Broadcasting Companies, Inc.*, 83 F.C.C. 2d 302, 305 (1980).

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2012, a copy of this Joint Opposition to Application for Review was served on counsel for Media Council Hawai'i via electronic mail. A hard copy was also delivered to MCH's counsel that same day via courier to the address shown below.

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June 3, 2013

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
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Re: Ex Parte Communication of the American Cable Association; *2010 Quadrennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

Dear Ms. Dortch:

The American Cable Association ("ACA") has previously brought to the Commission's attention the widespread and increasing consolidation in the local television station marketplace, particularly the rising prevalence of separately owned, same market Big 4 network affiliates (e.g., ABC, CBS, FOX, NBC) coordinating their activities in ways that are harmful to competition and consumers. ACA submits this letter in the above referenced dockets now in light of the significant number of recent broadcast television mergers and acquisitions and sharing agreements, which present fresh evidence highlighting how broadcasters effectively ignore the Commission's prohibition on duopoly ownership between top four-rated stations in the same market (usually Big 4 network affiliates), particularly through creative structuring of license transfers, followed by subsequent arrangements to coordinate activities. Taking into account deals that have closed in 2013, and those currently pending, within months there will likely be at least five new instances of top four-rated stations in a single market operating under a sharing arrangement, and the year is only half over. In light of the significant increase in local television consolidation, it is now more vital than ever that the Commission take action in its pending media ownership review to clarify the legal bounds of permissible sharing arrangements under its broadcast ownership and affiliation rules, and in particular, prohibit separately owned, same market broadcasters from coordinating their retransmission consent negotiations.

As part of the media ownership review, the Commission has sought comment on the practice of separately owned, same market broadcasters coordinating their activities.[1] ACA brings to the

[1] *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of* 1996; Promoting Diversification of Ownership In the Broadcasting Services, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 ¶¶ 204-208 (2011).

Commission's attention the following deals that highlight the increasing prevalence of separately owned, same market top four-rated stations operating as virtual duopolies in view of the Commission' statutory obligation to take account changes in the marketplace as part of its quadrennial media ownership review. We urge the Commission to take this information into account and properly evaluate the utility of continuing to permit these deals under its rules.

On April 24, the Nexstar Broadcasting Group ("Nexstar") and Mission Broadcasting ("Mission") announced their acquisition of Communications Corporation of America ("CCA") and White Knight Broadcasting ("WK"), and their intent to enter into sharing agreements with same market stations.[2] The transaction is structured at least in part to create two new virtual duopolies between top four-rated stations affiliated with Big 4 networks without running afoul of the Commission's local television ownership rule.[3] The two new virtual duopolies are:

- **Shreveport, LA: KMSS (FOX) and KTAL (NBC).** Nexstar currently owns KTAL (an NBC affiliate), and this transaction will result in Mission acquiring KMSS (a FOX affiliate) in the Shreveport, LA designated market area ("DMA)" from CCA. Upon the closing of these deals, Nexstar will enter into various coordination arrangements with Mission to provide services to KMSS.[4]

- **Midland-Odessa, TX: KPEJ (FOX) and KMID (ABC).** Nexstar currently owns KMID (an ABC affiliate), and this transaction will result in Mission acquiring KPEJ (a FOX affiliate) in the Midland-Odessa, TX DMA from CCA. Upon completion of the deal, Nexstar will enter into various coordination agreements with Mission to provide services to KPEJ.[5]

On February 28, Sinclair Broadcast Group ("Sinclair") announced that it and other companies with which it has close relations had entered into an agreement to purchase the broadcast assets of Barrington Broadcasting Group, LLC, ("Barrington") and to enter into sharing arrangements with same market stations.[6] As with the Nexstar deal, the Sinclair/Barrington deal has been structured to avoid technically violating the Commission's local television ownership rule.[7] This deal contemplates the creation of a new virtual duopoly between top four-rated stations affiliated with Big 4 networks:

- **Flint-Saginaw-Bay City, MI: WEYI (NBC) and WSMH (FOX).** Sinclair currently owns WSMH (a FOX affiliate), and this transaction will result in Howard Stirk Holdings, a newly formed, separately controlled entity created for the purpose of this transaction, acquiring

[2] Nexstar Broadcasting Group, Inc., *Nexstar Broadcasting Group and Mission Broadcasting to Acquire Communications Corporation of America and White Knight Broadcasting, Owners of 19 Television Stations in Ten Markets, for $270 Million in Accretive Transaction*, Apr. 24, 2013, http://www.nexstar.tv/index.php?option=com_content&view=article&id=14722:nexstar-broadcasting-group-and-mission-broadcasting-to-acquire-communications-corporation-of-america-and-white-knight-broadcasting-owners-of-19-television-stations-in-ten-markets-for-270-million-in-accretive-transaction&catid=40:cat-newsarticles&Itemid=97 ("Nexstar Press Release"); FCC Form 314, File No. BALCDT-20130503ACK, Ex. 5 (Description of Transaction), at 2-5 (filed May 6, 2013) ("Nexstar-CCA Transaction Description").
[3] Nexstar-CCA Transaction Description at 2.
[4] http://www.nexstar.tv/index.php?option=com_content&view=article&id=301&Itemid=2 (last visited on May 31, 2013) ("Nexstar Station List"); Nexstar-CCA Transaction Description at 3-4, 4 n.7.
[5] Nexstar Station List; Nexstar-CCA Transaction Description at 3-4, 4 n.7.
[6] Sinclair Broadcast Group, Inc., *Sinclair Broadcast Group Announces Agreement To Purchase Barrington TV Stations; Steven Pruett To Be Named Chief Operating Officer of Chesapeake TV Subsidiary* (Feb. 28, 2013).
[7] *See* FCC Form 314, File No. BALCDT-20130315ACS, Ex. 5, at 2 n.3 (filed Mar. 18, 2013) ("Sinclair Transaction Description").

WEYI (an NBC affiliate) in the Flint-Saginaw-Bay City, MI DMA from Barrington. Upon the closing of the deals, Sinclair will enter into various coordination agreements to provide services to WEYI.[8]

Several other recent deals that closed since January 1, 2013 also create new virtual duopolies involving top four stations that are Big 4 network affiliates:

- **Burlington, VT-Plattsburgh, NY: WFFF (FOX) and WVNY (ABC).** On March 1, 2013, Nexstar and Mission closed on transactions whereby Nexstar acquired WFFF (a FOX affiliate) from Smith Media, and Mission acquired WVNY (an ABC affiliate) from Lambert Broadcasting. Both stations cover the Burlington, VT-Plattsburgh, NY DMA. As part of these deals, Nexstar and Mission entered into a coordination agreement whereby Nexstar provides services to WVNY.[9]

- **Little Rock-Pine Bluff, AR: KARK (NBC) and KLRT-TV (FOX).** On January 1, 2013, Mission closed on its transaction to acquire KLRT-TV (a FOX affiliate) serving the Little Rock-Pine Bluff, AR DMA from Newport Television LLC. Nexstar already owned KARK (an NBC affiliate) in this market. As part of the deal, Nexstar entered into coordination agreements with Mission to provide services to KLRT-TV.[10]

In addition to the deals above creating virtual duopolies, the following approved and pending transactions raise related concerns.

- **Fresno, CA: KSEE (NBC) and KGPE (CBS).** On April 17, 2013, the Media Bureau approved Nexstar's assignment application to acquire KSEE (an NBC affiliate) in Fresno, CA, from Granite Broadcasting Corporation.[11] Upon the closing of the deal, Nexstar, which

[8] Sinclair Transaction Description at 2 n.3. Sinclair will provide support through a joint sales agreement and SSA to WEYI. The WEYI licensee, Howard Stirk Holdings, is a company controlled by Armstrong Williams, who reportedly has extensive ties to Sinclair. *See* Doug Halonen, *Armstrong Looks to Build on WEYI-WWMB*, TVNewsCheck, Mar. 6, 2013 (Sinclair has been distributing Williams' programming for more 10 years and guaranteed Wlliams' loan for HSH).

[9] Nexstar Broadcasting Group, Inc., *Nexstar Broadcasting and Mission Broadcasting Complete Acquisition of Two Vermont Stations for $16.9 Million* (Mar. 4, 2013), http://www.nexstar.tv/index.php?option=com_content&view=article&id=13702:nexstar-broadcasting-and-mission-broadcasting-complete-acquisition-of-two-vermont-stations-for-169-million&catid=40:cat-newsarticles&Itemid=97. *See also* WVNY Consummation Notice (filed Mar. 1, 2013); WFFF-TV Consummation Notice (filed Mar. 1, 2013); BALCDT - 20121109ADF (filed Jan. 3, 2013) (Nexstar and Mission entered into an SSA and other agreements regarding WFFF and WVNY).

[10] Nexstar Broadcasting Group, Inc., *Nexstar Broadcasting Announces Completion of Acquisition of Two Television Stations by Mission Broadcasting from Newport Television for $60 Million in Cash* (Jan. 3, 2013), http://www.nexstar.tv/index.php?option=com_content&view=article&id=12542:nexstar-broadcasting-announces-completion-of-acquisition-of-two-television-stations-by-mission-broadcasting-from-newport-television-for-60-million-in-cash&catid=40:cat-newsarticles&Itemid=97. *See also* KLRT-TV Consummation Notice (filed Jan. 4, 2013); BALCDT - 20120725AGJ (filed July 25, 2012); BALCDT - 20120725AGJ, Attach. 13 (filed July 25, 2012) (Nexstar and Mission entered into an SSA and other agreements regarding KARK and KLRT). *See also* Kevin Eck, *Layoffs Hit Little Rock's KLRT and KARK*, TVSpy, Jan. 30, 2013.

[11] Nexstar Broadcasting Group, Inc., *Nexstar Broadcasting Enters Into a Definitive Agreement to Acquire Fresno, California NBC Affiliate KSEE(Tv) For $26.5 Million in Accretive Transaction*, Feb. 6, 2013, http://nexstar.tv/index.php?option=com_content&view=article&id=13062:nexstar-broadcasting-enters-into-a-definitive-agreement-to-acquire-fresno-california-nbc-affiliate-kseetv-for-265-million-in-accretive-transaction&catid=40:cat-newsarticles&Itemid=97; BALCDT - 20130213ABR (granted Apr. 17, 2013).

acquired KGPE (a CBS affiliate) from Newport Television, LLC ("Newport") on February 1, 2013, will have an ownership interest in two Big 4 network stations in the market.[12] This is not a duopoly prohibited by the Commission's rules because one of the stations is currently the fifth highest-rated station in the market, but this transaction nevertheless results in a single company controlling two Big 4 network stations in a single market.[13]

- **Syracuse, NY: WSTM (NBC), WTVH (CBS) and WSYT (FOX).** As part of Sinclair's pending deal with Barrington, Sinclair will acquire WSTM (an NBC affiliate) covering the Syracuse, NY DMA, and assume Barrington's existing sharing agreement with Granite Broadcasting Corporation to provide services to WTVH (a CBS affiliate). This preserves the existing virtual duopoly involving top four-rated stations in this market.[14] Also, as part of the deal, Cunningham Broadcasting Corp. ("Cunningham") will acquire WSYT (a FOX affiliate) in the Syracuse, NY DMA from Sinclair.[15] Although Sinclair says it will not create a virtual triopoly by supporting the Cunningham station in this market,[16] these companies are known to have close relations and coordination agreements in many other markets.[17]

Press reports indicate that local television station consolidation (characterized by one of its prime practitioners as "rolling M&A thunder") will not stop with these transactions, either.[18]

These transactions, in combination with Senator Rockefeller's recent call for a GAO study on the various ways broadcasters in local television markets coordinate their activities and the impact of these practices on the broadcast landscape and consumers, highlight the importance of the Commission's focusing attention on this matter in its pending media ownership proceeding.[19] It is ACA's expectation

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[12] KGPE Consummation Notice (filed Feb. 19, 2013).
[13] In its license assignment application, Nexstar states that the resulting duopoly complies with the Commission's rules because "KSEE is not ranked among the top-four stations in the DMA." *See* BALCDT - 20130213ABR (Exh. 18, Multiple Ownership).
[14] Sinclair Transaction Description at 3 n.6, 5.
[15] *Id.* at 5.
[16] *Id.*
[17] *See, e.g.,* Price Colman, *Station Trading Continues Comeback In 1Q*, TVNewsCheck, Mar. 13, 2013 ("Sinclair's David Smith ... has used proxy companies — including Cunningham Broadcasting, Deerfield Media and a newly formed Howard Stirk Holdings headed by Armstrong Williams — to own stations that he operates in markets where FCC rules say Sinclair cannot own them itself."); Doug Halonen, *Sinclair Hops From Sixth To Third In Top 30*, TVNewsCheck, May 23, 2013 (Cunningham "function[s] essentially as [a] unit[]" of Sinclair); Harry A. Jessell, *Sinclair Makes It A Triopoly In Baltimore*, TVNewsCheck, Nov. 29, 2012 (Sinclair viewed as having a triopoly because other stations in that market are owned by "Cunningham Broadcasting, Sinclair's longtime duopoly partner that is controlled by trusts for the children of Sinclair's controlling shareholders."); Free Press, Petition to Deny and For Other Relief, *Applications of WXLV Licensee, LLC For Renewal of License of WXLV-TV, Winston-Salem, NC*, BRCT-20040730ART, etc., Nov. 1, 2004, *available at* http://www.sinclairwatch.net/petition.pdf.
[18] *See, e.g.*, Harry A. Jessell, *Broadcasting Bigness Raises Big Questions*, TVNewsCheck, May 10, 2013 (reporting that in broadcasting, "the hot station trading market is being fueled by sharply rising retrans revenue, cheap money and a permissive government" and that Nexstar's "Perry Sook has had a vision. He knows what the broadcasting business will look like after a few more rounds of station consolidation – 'rolling M&A thunder,' he calls it."); Harry A. Jessell, *Sook Forecasts More 'Rolling M&A Thunder*, TVNewsCheck, May 9, 2013 (Sook tells securities analysts that station trading market will remain hot through the end of the year; "The kind of rolling M&A thunder . . . will probably continue through the balance of this year and 2014, probably at about the same pace as you've seen over the last 18 to 24 months").
[19] *See* Letter from John D. Rockefeller, IV, Chairman, United States Senate, Committee on Commerce, Science, and Transportation, to Mr. Gene L. Dodaro, Comptroller General, United States Government Accountability Office (May 13, 2013) (asking GAO to investigate the "increased use of SSAs by television stations since the last FCC

that the GAO study will provide new information and data on the coordination by separately owned, same market broadcasters – information that has not yet been submitted into the record. We presume this new evidence will prove useful to the Commission to determine all the ways in which broadcasters coordinate their activities, and which should be limited or banned, particularly where the Commission previously has not had sufficient information to reach such a conclusion. However, with respect to the practice of separately owned top four-rated stations in the same market coordinating their retransmission consent agreements, the record before the Commission in its pending media ownership review is not lacking. The Commission already has before it a complete record detailing the extent to which broadcasters are engaging in the practice and its anticompetitive effects. Accordingly, there is no reason for the Commission not to rule on this matter in its pending media ownership review.

A diverse group of parties, including small and large cable operators, direct broadcast satellite providers, unions, and public interest groups, have previously raised concerns about the competitive harms that occur when separately owned, same market broadcast television licensees enter into arrangements whereby they coordinate their activities, particularly related to retransmission consent negotiations and combining their news operations.[20] These practices circumvent local media ownership limits and protections by reducing competition in the local media marketplace, decreasing diversity, and diminishing journalistic independence. In a previous filing, ACA documented 65 instances of separately owned, same market broadcasters affiliated with a Big 4 network operating under some form of sharing agreement.[21]

For MVPDs and their customers, the diminution of local television station competition through coordination of retransmission consent negotiations is an increasingly pressing issue. As ACA has repeatedly pointed out, the practice of separately owned, same market broadcasters coordinating their negotiation of retransmission consent has become both widespread and increasingly common.[22] For the last retransmission consent cycle, based on responses ACA member companies provided to ACA, it was reported that 48 pairs of separately owned Big 4 broadcasters in 43 different markets were engaging in this practice.[23] Attached to this letter is a list of these instances.

ACA member companies have attested to the fact that when two non-commonly owned Big 4 stations in a single market coordinate their retransmission consent negotiations, what little bargaining

media ownership review" and their effect on local broadcast competition, including their "impact on the overall programming costs paid by pay television providers").

[20] Letter from American Cable Association, DISH Network, Free Press, The Newspaper Guild-CWA, Time Warner Cable to Chairman Genachowski, MB Docket Nos. 09-182, 10-71 (Nov. 14, 2011) (explaining how broadcasters are coordinating their activities through contractual arrangements and other means to avoid the FCC's local television ownership rules resulting layoffs of station staff, reduced journalistic independence, and diminished competition for audiences, advertisers and multichannel video programming distributors (MVPDs) that carry these stations through retransmission consent agreements).

[21] Letter from Barbara Esbin, Counsel to ACA, to Marlene Dortch, Secretary, FCC, MB Docket Nos. 09-182, 10-71, at 2 (filed Nov. 19, 2012) (providing updated data concerning the number of separately owned, same market broadcasters affiliated with a Big 4 network operating under some form of sharing agreement).

[22] Comments of the American Cable Association, MB Docket No. 09-182, at 13-27 (filed Mar. 5. 2012) ("ACA Media Ownership Comments"); Reply Comments of the American Cable Association, MB Docket No. 09-182, at 5-17 (filed Apr. 17, 2012) ("ACA Media Ownership Reply Comments"); Comments of the American Cable Association, MB Docket No. 10-71, at 5-22 (filed May 27, 2011) ("ACA Retransmission Consent Comments"); Reply Comments of the American Cable Association, MB Docket. No. 10-71, at 5-11 (filed June 27, 2011) ("ACA Retransmission Consent Reply Comments").

[23] *See* Letter from 25 Smaller MVPDs to Julius Genachowski, Chairman, FCC, MB Docket Nos. 09-182, 10-71 (filed Feb. 4, 2013) ("25 Smaller MVPD Letter to FCC").

power MVPDs have to secure retransmission consent at fair market value is materially reduced.[24] This is because the coordinating stations can withdraw two Big 4 stations simultaneously. ACA has shown through empirical evidence consistent with economic theory that this practice results in significant price increases of at least 22 percent.[25] The fact that separately owned, same market Big 4 stations can secure higher retransmission consent fees by coordinating their negotiations is strong evidence that broadcasters engaging in this practice are reducing competition in their local markets compared with broadcasters who are not coordinating their negotiations.

It is noteworthy that Nexstar and Mission, and Sinclair and Cunningham — which operate under various services agreements — alone represent more than *30 percent* of the instances of two Big 4 stations in the same market using a single representative to negotiate retransmission consent. There should be little doubt that once the instant transactions are consummated, the list of instances of coordinated retransmission consent negotiations will continue to grow.

Ironically, in 2011 Nexstar itself recognized the harm to local television competition when a single entity, in that case Granite Broadcasting, gained control of three of the Big 4 stations in a single market (in which Nexstar owned a station) through Granite's combination of ownership and services agreements with Malara Broadcasting. Nexstar took action to protect itself from this harm by filing a federal antitrust action seeking to have the combination broken up.[26] As ACA noted at the time, both the Nexstar action and ACA's advocacy before the Commission complain of the same competitive harm of a single broadcaster controlling the sales activities of other separately owned stations in the same DMA, through a combination of ownership and sharing agreements with non-commonly owned stations.[27]

The Commission has had before it for some time ample record evidence that these practices result in harm to local competition and television service customers. It cannot continue to ignore that its local television ownership limits are being undermined through transactions and arrangements structured to create de facto duopolies that are prohibited by law and fail to take action in any proceeding.[28] With the Media Bureau cognizant of public interest harms, but either unwilling or unable thus far to end these abusive practices in the context of individual license transfer applications, the task of necessity falls to the

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[24] *See id.* at 1-2.

[25] *See* ACA Media Ownership Comments at 9.

[26] Complaint, *Nexstar Broad., Inc. v. Granite Broad. Corp., et al.*, No. 1:11-cv-00249 (N.D. Ind. Jul. 25, 2011).

[27] Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, MB Docket No. 10-71 (Aug. 3, 2011) ("Nexstar's Complaint avers in essence that when a single station controls three of the top four network affiliates in the same market and two of the independent network affiliates for a total of five out of the six national networks, harm to local advertising purchasers and the consumers buying the advertised products results. This is *precisely the same underlying competitive harm* identified by ACA in its retransmission consent reform Comments and Reply Comments: competing sellers in a single market that coordinate their retransmission consent negotiations have the ability to exercise substantial market power over prices, and that this exercise of market power has and will cause retransmission consent prices to rise above competitive levels, to the detriment of MVPDs and their subscribers in the affected local market. ACA Retransmission Consent Comments at 6-7; ACA Retransmission Consent Reply Comments at 2-3."); *see also* Letter from Matthew A. Brill, Counsel to Time Warner Cable, to Marlene Dortch, MB Docket Nos. 09-182, 10-71 (Aug. 3, 2011).

[28] *See, e.g.*, KHNL/KGMB License Subsidiary, LLC, et al., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087 (MB, 2011) ¶ 23 (recognizing that the transaction "is clearly at odds with the purpose and intent of the duopoly rule," but deferring action on such practices); Letter from Barbara A. Kreisman, Chief, Video Division, FCC to Counsel re Assignment of License of KTKA-TV, from Free State Communications, LLC to PBC Broadcasting of Topeka License, LLC, Topeka, KS, ID No. 49397, File No. BALCDT-20110208ADB, 26 FCC Rcd 10310 (MB, Video Div., 2011) (denying ACA petition to deny, which demonstrated the significant likelihood of coordinated negotiation of retransmission consent agreements, because this is "one of the issues squarely under consideration in the Retransmission Consent Proceeding").

Commission to act in the industry-wide rulemakings that have been pending before it for more than three years. In conclusion, the time is now for the Commission to explicitly recognize that these practices create an attributable ownership interest for a broadcaster engaging in any one of four practices of coordinated retransmission consent negotiations ACA and others have previously identified.[29]

Sincerely,

Ross J. Lieberman

Attachment (1)

cc (*via email*): William Lake
Michelle Carey
Sarah Whitesell
Matthew Berry
Alex Hoehn-Saric

[29] The four practices to be deemed attributable ownership interests are: (i) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA; (ii) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party; (iii) any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and (iv) any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, or the status of negotiations over future retransmission consent agreements. ACA Media Ownership Comments at 26-27; ACA Media Ownership Reply Comments at 11-17.

48 Instances of Separately Owned, Same-Market Broadcasters Affiliated with a Big 4 Network Simultaneously Negotiating Retransmission Consent With an MVPD Using a Single Representative

		Station #1			Station #2		
DMA	DMA Rank	Owner (also Controlling Entity)	Call Letters	Affil.	Owner	Call Letters	Affil.
Columbus, OH	32	Sinclair Broadcast Group	WSYX	ABC	Cunningham Broadcasting	WTTE	FOX
Jacksonville	50	Newport Television	WAWS	FOX	High Plains Broadcasting	WTEV	CBS
Providence-New Bedford	53	LIN TV	WPRI	CBS	Super Towers	WNAC	FOX
Wilkes Barre-Scranton-Hztn	54	Nexstar Broadcasting Group	WBRE	NBC	Mission Broadcasting	WYOU	CBS
Dayton	63	Sinclair Broadcast Group	WKEF	ABC	Cunningham Broadcasting	WRGT	FOX
Charleston-Huntington	65	Sinclair Broadcast Group	WCHS	ABC	Cunningham Broadcasting	WVAH	FOX
Springfield, MO	75	Schurz Communications	KYTV	NBC	Perkin Media	KSPR	ABC
Cedar Rapids-Wtrlo-IWC&Dub	89	Sinclair Broadcast Group	KGAN	CBS	Second Generation of Iowa	KFXA	FOX
Savannah	92	New Vision Television	WJCL	ABC	Parkin Broadcasting	WTGS	FOX
Baton Rouge	94	Communication Corp of America	WGMB	FOX	White Knight Broadcasting	WVLA	NBC
Burlington-Plattsburgh	95	Smith Media	WFFF	FOX	Lambert Broadcasting	WVNY	ABC
Greenville-N. Bern-Washngtn	99	Bonten Media Group	WCTI	ABC	Esteem Broadcasting	WFXI	FOX
Johnstown-Altoona-St Colge	102	Peak Media	WWCP	FOX	Palm Television	WATM	ABC
Lincoln & Hastings-Krny	105	Pappas Telecasting	KHGI	ABC	Omaha World-Herald	KFXL	FOX
Tyler-Longview(Lfkn&Ncgd)	107	Communication Corp of America	KETK	NBC	White Knight Broadcasting	KFXK	FOX
Fort Wayne	109	Granite Broadcasting	WISE	NBC	Malara Broadcasting Group	WPTA	ABC
Youngstown	110	New Vision Television	WKBN	CBS	Parkin Broadcasting	WYTV	ABC
Augusta-Aiken	111	Media General	WJBF	ABC	Schurz Communications	WAGT	NBC
Peoria-Bloomington	116	Granite Broadcasting Crop.	WEEK	NBC	Barrington Broadcasting	WHOI	ABC
Peoria-Bloomington	116	Nexstar Broadcasting Group	WMBD	CBS	Sinclair Broadcast Group	WYZZ	FOX
Fargo-Valley City	117	Hoak Media	KVLY	NBC	Parker Broadcasting	KXJB	CBS
Traverse City-Cadillac	120	Heritage Broadcasting Group	WWTV	CBS	Cadillac Telecasting	WFQX	FOX
Columbus, GA (Opelika, AL)	127	Raycom Media	WTVM	ABC	Southeastern Media Holdings	WXTX	FOX
Amarillo	130	Nexstar Broadcasting Group	KAMR	NBC	Mission Broadcasting	KCIT	FOX
Chico-Redding	131	Catamount Holdings	KHSL	CBS	Evans Broadcasting	KNVN	NBC
Wilmington	132	Raycom Media	WECT	NBC	Southeastern Media Holdings	WSFX	FOX
Columbus-Tupelo-W Pnt-Hstn	133	WTVA, Inc.	WTVA	NBC	Southern Broadcasting	WKDH	ABC
					Lingard Broadcasting	WLOV	FOX
Rockford	134	Nexstar Broadcasting Group	KQRF	FOX	Mission Broadcasting	WTVO	ABC
Topeka	136	New Vision Television	KTKA	ABC	Parkin Broadcasting	KSNT	NBC
Monroe, LA-El Dorado	137	Hoak Media	KNOE	CBS	Parker Broadcasting	KAQY	ABC
Monroe, LA-El Dorado	137	Nexstar Broadcasting Group	KARD	FOX	Mission Broadcasting	KTVE	NBC
Duluth-Superior	139	Granite Broadcasting	KBJR	NBC	Malara Broadcast Group	KDLH	CBS
Wichita Falls & Lawton	142	Nexstar Broadcasting Group	KFDX	NBC	Mission Broadcasting	KJTL	FOX
Wichita Falls & Lawton	142	Drewry Broadcast Group	KSWO	ABC	Hoak Media	KAUZ	CBS
Lubbock	143	Nexstar Broadcasting Group	KLBK	CBS	Mission Broadcasting	KAMC	ABC

48 Instances of Separately Owned, Same-Market Broadcasters Affiliated with a Big 4 Network Simultaneously Negotiating Retransmission Consent With an MVPD Using a Single Representative

		Station #1			Station #2		
DMA	DMA Rank	Owner (also Controlling Entity)	Call Letters	Affil.	Owner	Call Letters	Affil.
Erie	146	Nexstar Broadcasting Group	WJET	ABC	Mission Broadcasting	WFXP	FOX
Erie	146	SJL of Pennsylvania	WICU	NBC	Lilly Broadcasting	WSEE	CBS
Sioux City	147	Titan TV Broadcast Group	KPTH	FOX	Waitt Broadcasting	KMEG	CBS
Anchorage	148	Coastal Television Broadcasting	KTBY	Fox	Vision Alaska	KYUR	ABC
Joplin-Pittsburg	149	Nexstar Broadcasting Group	KSNF	NBC	Mission Broadcasting	KODE	ABC
Joplin-Pittsburg	149	Saga Communications	KOAM	CBS	Surtsey Media	KFJX	FOX
Rochestr-Mason City-Austin	153	Quincy Newspapers	KTTC	NBC	SagamoreHill Broadcasting	KXLT	FOX
Terre Haute	154	Nexstar Broadcasting Group	WTWO	NBC	Mission Broadcasting	WFXW	FOX
Gainesville	163	CP Media	WGFL	CBS	MPS Media	WNBW	NBC
Abilene-Sweetwater	164	Nexstar Broadcasting Group	KTAB	CBS	Mission Broadcasting	KRBC	NBC
Billings	168	Nexstar Broadcasting Group	KSVI	ABC	Mission Broadcasting	KHMT	FOX
Casper-Riverton	196	Mark III Media	KGWC	CBS	Silverton Broadcasting	KTWO	ABC
					Wyomedia	KFNB	FOX
San Angelo	197	Nexstar Broadcasting Group	KLST	CBS	Mission Broadcasting	KSAN	NBC

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEB SITE: http://commerce.senate.gov

May 13, 2013

Mr. Gene L. Dodaro
Comptroller General
United States Government Accountability Office
441 G Street, NW
Washington, DC 20584

Dear Mr. Dodaro:

Diversity of ownership and voices is vital to the nation's media landscape. For decades, the Federal Communications Commission (FCC) has implemented the congressionally recognized need to maintain a vibrant, diverse, locally oriented broadcast environment in the United States. The FCC has done so by maintaining necessary limits on the number of broadcast outlets a company can own or control in a local market and nationwide.

The FCC is currently in the midst of a quadrennial review of its media ownership rules, as mandated by the Communications Act of 1934. Reports indicate that as part of this review, the FCC may vote to relax several longstanding ownership limitations. I have long had concerns about the public interest impact of weakening the existing media ownership rules. I believe the FCC should act with caution in this area and not make changes to the media ownership rules unless the agency can demonstrate clearly that localism, independence, and diversity of views will be advanced by any changes made to the rules.

During this present media ownership review, several stakeholders have raised questions about the impact Joint Sales Agreements (JSAs) and Shared Services Agreements (SSAs) have on consumers and competition. The FCC imposed limits years ago on the use of JSAs by radio stations. In the radio context, a station that brokers or sells more than 15 percent of the advertising time of another radio station is deemed to have an ownership interest in that second station for purposes of the application of the media ownership rules. In a past proceeding, the FCC tentatively concluded that similar rules should apply in the television context, but has not yet formally adopted such rules.

There appears to be increased use of SSAs by television stations since the last FCC media ownership review. Some stakeholders have voiced concerns that SSAs have become a tool that broadcast ownership groups use to skirt the FCC's existing ownership rules to the detriment of consumers. These groups suggest that SSAs, along with other formal and informal business arrangements between stations in a market ("coordination arrangements"), give one station effective control over the operation and business activities of another station in the same market without assuming formal ownership or control of the station's license. In fact, some groups contend that SSAs and other coordination arrangements serve to artificially inflate retransmission consent rates in a local market, and as a result, drive up subscription fees for pay television consumers.

Others maintain that broadcaster coordination is beneficial to stations and consumers. They argue that leveraging operational efficiencies can allow stations to devote more resources to newsgathering or local TV program production. Because these arrangements and contracts are largely private, though, it is difficult to evaluate these claims.

In light of the serious questions raised about the impact of JSAs, SSAs, and other coordination arrangements on the broadcast landscape and ultimately on consumers, I ask that the Government Accountability Office take a closer look at the ways broadcasters in local television markets coordinate their activities. In particular, please consider the following questions:

1. What is the general nature of the JSAs, SSAs, and other coordination arrangements, and how are they used by the broadcast industry?

2. How many broadcasters are parties to JSAs, SSAs, or coordination arrangements? If GAO is unable to uncover such information, please explain why.

3. To what extent are these JSAs, SSAs, or coordination arrangements between the top 4 stations in a particular Nielsen designated market area?

4. What are the competitive impacts that result from the use of JSAs, SSAs, or coordination arrangements by broadcasters? In particular, do such agreements serve to inflate retransmission consent payments, or make programming blackouts more likely? Do they have an impact on the overall programming costs paid by pay television providers? Are there other impacts caused by the use of these agreements?

5. What are the consumer impacts that result from the use of JSAs, SSAs, or coordination arrangements by broadcasters? In particular, do such agreements have an impact on the subscription costs for pay television services? Do they actually result in additional local programming, or merely repetition of content from one station on multiple outlets?

6. What impediments, if any, exist to prevent the FCC from requiring that all copies of JSAs and SSAs, and other evidence of coordination

arrangements between television stations, be placed on file with the FCC and disclosed publicly?

7. Are there aspects of JSAs, SSAs, or coordination arrangements that should be regulated in order to preserve competition or protect consumers? Would such regulation be consistent with the public interest obligations of broadcast TV station licensees?

I believe that the answers to these questions would help policymakers determine what can and should be done about broadcasters' use of JSAs, SSAs, and coordination arrangements. Thank you for your attention to this request. Should you have any questions regarding this letter, please contact John Branscome or Shawn Bone at (202) 224-9340.

Sincerely,

Jay Rockefeller

JOHN D. ROCKEFELLER IV
Chairman